Overcoming offence diversities in EU policy making

Needs and feasibility assessment

Doctoranda: Wendy De Bondt
Promotor: Prof. dr. Gert Vermeulen

Doctoraal proefschrift neergelegd
tot het behalen van de graad van
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Acronyms and abbreviations

Benelux Execution	Traité 29 septembre 1968 sur l'exécution des décisions judiciaires rendues en matière pénale entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas.
Benelux Transfer of Proceedings	Traité 11 mai 1974 entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas sur la transmission des poursuites
Benelux Extradition	Traité 27 juin 1962 d'extradition et d'entreaide judiciaire en matière pénale entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas.
CIRCA	European Commission Communication and Information Resource Centre Administrator
CISA	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders
CoE	Council of Europe
CoE Conditional Sentences	Council of Europe (1964) European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders
CoE Confiscation	Council of Europe (1990). Convention on Laundering, Search, Seizure and Confiscation of Proceeds from Crime
CoE Extradition	Council of Europe (1957). European Convention on Extradition
CoE International Validity	Council of Europe (1970), European Convention on the International Validity of Criminal Judgements
CoE Transfer of Prisoners	Council of Europe (1985). Convention on the Transfer of Sentenced Persons
COM	European Commission
DAPIX	Working Party on Information Exchange and Data Protection
DCR	Double criminality requirement
DIR Child Pornography	Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on

	combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA
e.g.	Exempli gratia, for example
EAW	European Arrest Warrant
EBP	Evidence based policy making
EC	European Community
ECHR	European Convention of Human Rights
ECJ	European Court of Justice
ECMA	Council of Europe (1959). European Convention on mutual assistance in criminal matters
ECRIS	European Criminal Records Information System
ECtHR	European Court of Human Rights
EEW	European Evidence Warrant
EIO	European Investigation Order
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EMS	Executing member state
EPRIS	European Police Records Index System
EU	European Union
EU DC	European Union wide double criminality proof
EU Extradition	Convention drawn up on the basis of Article K.3 of the Treaty on European Union, of 27 September 1996 relating to Extradition between the Member States of the European Union
EU MLA Convention	European Union – Convention on Mutual Legal Assistance
EULOCS	EU level offence classification system
EUMC	European Monitoring Centre on Racism and Xenophobia
Eurojust Decision (new)	Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime
Eurojust Decision (old)	Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime. OJ L 63 of 6.3.2002
Europol Convention	Council Act of 26 July 1995 drawing up the Convention on the establishment of a European

	Police Office
Europol Decision	Council Decision of 6 April 2009 establishing the European Police Office
Eurostat	Statistical office of the European Union
FD Alternatives	Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions
FD Child Pornography	Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography
FD Confiscation	Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders
FD Corruption	Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector
FD Deprivation of Liberty	Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union
FD EAW	Council Framework decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States
FD EEW	Council Framework decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters
FD Fin Pen	Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties
FD Freezing	Council Framework Decision of 22 July 2003 on the execution in the EU of orders freezing property or evidence
FD Organised Crime	Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime
FD Prior Convictions	Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the

	Member States of the European Union in the course of new criminal proceedings
FD Supervision	Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention
FD Terrorism	Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism *as amended by* Council Framework Decision 2008/919/JHA amending Framework Decision 2002/475/JHA on combating terrorism
FRA	European Union Agency for Fundamental Rights
FRA principle	Forum Regit Actum principle
i.e.	Id est, that is (to say)
IMS	Issuing member state
JHA	Justice and Home Affairs
MLA	Mutual legal assistance
MR	Mutual recognition
Naples II	Convention on mutual assistance and cooperation between customs administrations
Nat. DC	National double criminality proof
OCSR	Organised Crime Situation Report
OCTA	Organised Crime Treat Assessment Reports
OJ	Official Journal
Procurement Directive	Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts
TEC	Treaty establishing the European Community
TE-SAT	EU Terrorism Situation and Trend Report
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention on Transnational Organised Crime

Preface

Before embarking with the core of the doctoral thesis, this preface is used to briefly elaborate on (1) the problem definition and the research questions, (2) the publication based character of the doctoral thesis and (3) the approach used to formulate and answer to the research questions.

Problem definition and research questions

Starting from the observation that criminal law is different in each of the member states as a result of which (1) what constitutes an offence in one member state does not necessarily constitute an offence in another member state, (2) even where criminalisation matches there might still be significant differences in the sanction types and levels foreseen and (3) more generally, the position of the offences in the entirety of the justice system may vary, the following research questions arise: ***"To what extent are the offence diversities an obstacle for EU policy making?"*** and ***"To what extent is it feasible to overcome the obstacles in a comprehensive, consistent and well-balanced way?"***. **Comprehensive** meaning all-encompassing as opposed to in an *ad hoc* piecemeal way; **Consistent** meaning that policies are logically interlinked, compatible and in support of each other as opposed to isolated and running the risk of being incompatible and undermining each other; **Well-balanced** meaning acceptable for all parties involved, striving to avoid member state declarations not to agree with certain provisions in the instruments.

To answer those questions, it is first and foremost required to identify the policy areas for which offences are important and thus for which offence diversities could be an obstacle. Analysis revealed that there is a wide variety of policy areas that are to a greater or lesser extent offence-dependent.

First, to evaluate the functioning of a criminal justice system and prepare new criminal policy initiatives, crime statistics are a vital source of information. In light thereof, member states do not only look into their own crime statistics, but are growing to be more and more keen on cross-national comparison of crime statistics. Furthermore, the EU in its capacity of a criminal policy maker is also highly interested in cross-nationally compiled crime statistics. It is widely accepted that criminalisation diversity is an obstacle for the comparability of crime statistics. Statistics of different member states are not comparable and cannot be collated if the underlying criminalisation is not identical. In this crime statistics context the central research questions are reformulated to read: ***"To what extent are comparable crime statistics a necessity for EU policy making?"*** and ***"To what extent is it feasible to ensure the comparability of crime statistics***

overcoming the obstacles in a comprehensive, consistent and well-balanced way?".

Second, some forms of cooperation in criminal matters are made dependent on the so-called double criminality requirement, meaning that member states have limited their willingness to cooperate to situations where the behaviour underlying the cooperation request is equally criminalised in their jurisdiction. The criminal justice system is only activated if an offence is involved. Here too, criminalisation diversity can be an obstacle. In this context the central research questions are reformulated to read: ***"To what extent is international cooperation in criminal matters dependent on the double criminality requirement?"*** and ***"To what extent is it feasible to overcome the obstacles caused by criminalisation diversity in a comprehensive, consistent and well-balanced way?"***

Third, with respect to cross-border gathering and admissibility of evidence in the EU, the link with the offence diversities extends beyond the criminalisation diversity that gave rise to the introduction of a double criminality requirement. Diversity in the position of the offence in the justice system surfaces in this context. Reference can be made to the offence-limits in the use of investigative measures, in that the national law of the executing member state could have limited the use of investigative measures to a specific set of offences. This offence diversity will be an obstacle when evidence is (required to be) gathered using the said investigative measure with respect to another offence. In this context the central research questions are reformulated to read: ***"To what extent are offence diversities an obstacle to cross-border gathering and admissibility of evidence?"*** and ***"To what extent is it feasible to overcome evidence gathering difficulties in a comprehensive, consistent and well-balanced way?"***

Fourth, offence labels also feature in the mandates of the EU level actors. Reference can be made to the list of offences for which Europol is made competent. The open-ended character of the mandates of the EU level actors has been subject to intense debate. Not only does the vague delineation of the mandates hinder their current tasks (e.g. it is a significant obstacle to ensuring data flow to the EU level actors), it is also an obstacle in the debates on the possibility to attribute stronger powers to the EU level actors. In this context the central research questions are reformulated to read: ***"To what extent are offence diversities an obstacle for the delineation of the mandates of the EU level actors?"*** and ***"To what extent is it feasible to clarify the mandates of the EU level actors in a comprehensive, consistent and well-balanced way?"***

Fifth, offence labels are also relevant when seeking cross-border execution of sentences. Prior to the start of the execution, the executing member state may test whether the foreign sentence is equivalent to the sentence that would have been imposed in a national procedure. The provisions ensuring sentence equivalence in the context of cross-border execution of a sentence are offence dependent in that information on the underlying offence is necessary to identify the national equivalent of a sentence imposed abroad. In this context the central research questions are reformulated to read: ***"To what extent are offence diversities an obstacle for the identification of the national equivalent for a sentence imposed abroad?"*** and ***"To what extent is it feasible to support the identification of the equivalent sentence in a comprehensive, consistent and well-balanced way?"***

Sixth and final, there is a wide variety of prior conviction provisions, i.e. the legal provisions that govern the taking account of a prior conviction in the course of a new procedure. That new procedure can either or not be a criminal procedure. Reference can be made to conviction related exclusion grounds that are found in employment law or public procurement law to support that these provisions beyond the criminal procedure. Candidates that have been convicted for any of the listed offences are not eligible anymore. In that context the central research questions are reformulated to read: ***"To what extent are offence diversities an obstacle for the taking account of prior convictions in the course of a new procedure?"*** and ***"To what extent is it feasible to scope the taking account of prior convictions in a comprehensive, consistent and well-balanced way?"***

Publication based doctoral thesis

These research questions were answered in a publication based doctoral thesis comprising two journal articles and three book chapters, annexed as part 2 of this doctoral thesis.

The following publications are compiled:

- De Bondt, W. (in review). Evidence based EU criminal policy making: in search of valid data. European Journal on Criminal Policy and Research.
- De Bondt, W. (2012). Double criminality in international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality (pp. 86-159). Antwerp-Apeldoorn-Portland: Maklu.

- De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality. Antwerp-Apeldoorn-Portland: Maklu.
- De Bondt, W. (in review). Cross-border recidivism in the EU: Fact or Fiction? Evaluating the supporting policy triangle. Punishment and Society.
- De Bondt, W. (2012). Rethinking public procurement exclusions in the EU. In G. Vermeulen, W. De Bondt, C. Ryckman, & N. Persak (Eds.), The disqualification triad. Approximating legislation. Executing requests. Ensuring equivalence. Antwerp-Apeldoorn-Portland: Maklu.

The book chapters are published in the context of EU funded research projects. They have been reviewed by the national experts and the European Commission and have been subjected to an additional traditional academic peer review. The articles have been submitted to leading international peer reviewed journals and have both been accepted for review.

Approach

Offence diversities & crime statistics

First, participating in the EU study on crime statistics in the member states, the doctoral research started within that sphere. Three phases can be distinguished.

Firstly, taking account of the fact that offence diversities are an obstacle to obtain comparable crime statistics, a thorough legal analysis was conducted to map the existing *knowledge* on common criminalisation for that knowledge would reflect to what extent comparable crime statistics are *feasible* from a *theoretical* point of view. In doing so, an Esperanto for EU crime statistics[1] was designed, which was presented in an EU level offence classification system, called EULOCS.[2]

[1] Preliminary remarks on the need for and feasibility of an Esperanto were published as De Bondt, W., & Vermeulen, G. (2009). Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 2, pp. 87-124). Antwerp - Apeldoorn - Portland: Maklu.

[2] The outcome of this phase was published as Vermeulen, G., & De Bondt, W. (2009). EULOCS. The EU level offence classification system: a bench-mark for enhanced internal coherence of the EU's criminal policy (Vol. 35, IRCP-series). Antwerp - Apeldoorn - Portland: Maklu.

Secondly, through questionnaires sent to the police authorities in each of the member states in the course of the EU study, the *practical* feasibility of using the knowledge on common criminalisation as a basis to gather comparable crime statistics was assessed. The police authorities were asked to elaborate on the level of detail in their data systems and to indicate to what extent it would be feasible to single out the data that matched the known common denominator to ensure EU wide comparability of crime statistics.[3]

Thirdly and finally, an additional retrospective discourse analysis was conducted on 569 legal and policy documents to identify the EU's priority offences for which comparable crime statistics are indispensable as a basis for sound policy making. In doing so an answer is formulated to the question "To what extent are comparable crime statistics a necessity for EU policy making?". Subsequently a comparative analysis was conducted between the identified priority offences and empirical data on the level of detail in the national data systems to assess to what extent the required comparable crime statistics are available. Finally, to answer to the question "To what extent is it feasible to ensure the comparability of crime statistics overcoming the obstacles in a comprehensive, consistent and well-balanced way?" a number of recommendations for immediate EU actions were formulated.

The result of the analysis is included in the following publication:

– De Bondt, W. (in review). Evidence based EU criminal policy making: in search of valid data. European Journal on Criminal Policy and Research.

Offence diversities & double criminality

Second, the effect of offence diversities on the double criminality limits to cooperation was analysed. Two phases can be distinguished.

Firstly, participating in the EU study on evidence, the analysis of the double criminality requirement was conducted for that one specific sphere, i.e. the cross-border gathering and admissibility of evidence, be under a mutual legal assistance or a mutual recognition regime. Based on a legal analysis of the existing legal framework, a questionnaire was drawn up and sent to the member

[3] The final report of that study was published as Mennens, A., De Wever, W., Dalamanga, A., Kalamara, A., Kaslauskaite, G., Vermeulen, G., De Bondt, W. (2009). Developing an EU level offence classification system: EU study to implement the Action Plan to measure crime and criminal justice (Vol. 34, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu; The added value of a EULOCS-based approach was additionally underlined in De Bondt, W., & Vermeulen, G. (2010). Revolutions in EU Crime Statistics: EULOCS - the EU level offence classification system. In L. Pauwels, & G. Vermeulen (Eds.), Actualia strafrecht en criminologie (Vol. 4, pp. 473-493). Antwerp-Apeldoorn-Portland: Maklu.

states, asking practitioners and policy makers to reflect on the future of the double criminality requirement, focussing on the future of the 32 MR offence list for which double criminality had been abandoned. The feasibility to drastically change the approach and abandon the double criminality *test* (as opposed to the double criminality *requirement*) using the approximation acquis as a baseline was accepted.[4] That acceptability is crucial when striving to ensure well-balanced policy making.

Secondly, participating in the EU study on the future of the entire landscape of international cooperation in criminal matters, the analysis of the double criminality requirement was extended to encompass all cooperation spheres. Based on a more extended legal analysis of the legal framework governing international cooperation in criminal matters, a questionnaire was drawn up and sent to the member states, asking practitioners and policy makers again to reflect on the future of the double criminality requirement and the feasibility of using the approximation acquis to its full supporting potential. In addition thereto, the topic was discussed during a number of the focus group meetings held in the member states.

In doing so an answer was formulated to the questions "To what extent is international cooperation in criminal matters dependent on the double criminality requirement?" and "To what extent is it feasible to overcome the obstacles in a comprehensive, consistent and well-balanced way?"

The result of the analysis is included in the following publication:

– De Bondt, W. (2012). Double criminality in international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality (pp. 86-159). Antwerp-Apeldoorn-Portland: Maklu.

Offence diversities & evidence gathering, sentence equivalence and mandate delineation

Third, the effect of offence diversities for international cooperation extends beyond the double criminality requirement. The diversity with respect to the sanction types and levels that can be imposed and the diversity with respect to

[4] The final report of that study – the scope of which exceeded the issues related to the double criminality requirement – was published as Vermeulen, G., De Bondt, W., & Van Damme, Y. (2010). EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? (Vol. 37, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

the position of the offences in the justice system also create obstacles for cooperation. The spheres of cross-border gathering and subsequent admissibility of evidence, the identification of the national equivalence of a foreign sanction and delineation of the mandated offences are all examples thereof. The obstacles have been dealt with in three different EU studies.

Firstly, in the context of the abovementioned EU study on the laws of evidence in the EU, it was also highlighted that the use of investigative measures is not always unlimited and the situation may occur in which the national law of the executing member state does not allow the use of the requested investigative measure with respect to the specific offence involved. Through a questionnaire sent to the member states, it was assessed to what extent that type of offence-related exclusion grounds could benefit from the knowledge on common criminalisation as a baseline,[5] i.e. to what extent it is an acceptable future policy option to deny member states the use of the refusal ground in relation to some offences. That kind of information is crucial when striving to ensure well-balanced policy making.

Secondly, in the context of an EU study on detention, it was argued that criminalisation diversity is also an obstacle for the correct application of adaptation provisions, i.e. the provisions stipulating that executing member states are allowed to adapt either its nature or duration if the sentence as imposed by the issuing member state is inconsistent with their national law.[6]

Thirdly, the EU level actors assume an important position in international cooperation in criminal matters. The difficulties caused by the criminalisation diversity are related to the delineation of their mandates. In the context of the abovementioned EU study on the future of international cooperation in criminal matters, the opportunity was seized to identify not only the obstacles with respect to the delineation of the mandated offences and assess the political acceptability of a number of recommendations, it was also used to go through the entirety of international cooperation and identify all obstacles caused by the offence diversities and assess the feasibility of overcoming them.

In doing so, an answer was formulated to the questions "To what extent are offence diversities an obstacle to cross-border gathering and admissibility of

[5] The final report of that study was published as Vermeulen, G., De Bondt, W., & Van Damme, Y. (2010). EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? (Vol. 37, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

[6] The final report of that study was published as Vermeulen, G., van Kalmthout, A., Paterson, N., Knapen, M., Verbeke, P., & De Bondt, W. (2011). Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures (Vol. 40, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

evidence?" and "To what extent is it feasible to overcome evidence gathering difficulties in a comprehensive, consistent and well-balanced way?"; "To what extent are offence diversities an obstacle for the identification of the national equivalent for a sentence imposed abroad?" and "To what extent is it feasible to support the identification of the equivalent sentence in a comprehensive, consistent and well-balanced way?"; "To what extent are offence diversities an obstacle for the delineation of the mandates of the EU level actors?" and "To what extent is it feasible to clarify the mandates of the EU level actors in a comprehensive, consistent and well-balanced way?"

The result of the analysis is included in the following publication[7]:

– De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality. Antwerp-Apeldoorn-Portland: Maklu.

Offence diversities & prior convictions

Third, offence diversities can also be an obstacle when confronted with prior convictions. What immediately comes to mind are the prior conviction provisions found in criminal law. The obstacles that are identified there link in with the obstacles identified in relation to what was elaborated on under the previous section. However, prior convictions also feature beyond criminal procedures. Reference can be made to prior conviction provisions in employment law or public procurement law. To highlight not only the variety of prior conviction provisions both within and beyond criminal law, but also to highlight the fact that the obstacles and the feasibility of dealing with them differences, two case studies were dealt with under a separate heading "offence diversities & prior convictions".

Firstly, criminalisation diversity when taking account of prior convictions in the course of a new criminal procedure was dealt with. Though prior convictions can be relevant in all stages of the criminal procedure, the choice was made to elaborate on the sentencing provisions and look into the feasibility of cross-

[7] Additionally, besides the above mentionned books, these questions also feature in two older publications: De Bondt, W., & Vermeulen, G. (2009). Justitiële samenwerking en harmonisatie. Over het hoe en het waarom van een optimalisering in het gebruik van verwezenlijkingen op vlak van harmonisatie bij de uitbouw van justitiële samenwerking. Panopticon, 6, 47; De Bondt, W., & Vermeulen, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

border recidivism in the EU. Using the empirical data gathered in the abovementioned EU study on the future of international cooperation in criminal matters as a baseline, additional comparative legal research into the national recidivism provisions of each of the 27 member states was conducted. In doing so an answer was formulated to the questions: "To what extent are offence diversities an obstacle for the taking account of prior convictions in the course of a new *criminal* procedure?" and "To what extent is it feasible to scope the taking account of prior convictions in a comprehensive, consistent and well-balanced way?"

Secondly, criminalisation diversity when taking account of prior convictions in the course of a public procurement procedure was dealt with. The obstacles and feasibility of overcoming them are different because the rules governing public procurement are linked to the functioning of the internal market. As a result, the legal analysis did not only comprise the national public procurement legislation of each of the 27 member states complemented with specific EU legislation, it also included the effect of the equal treatment requirement, as a basic principle ensuring the proper functioning of the internal market. The case study was refined and finalised in the context of a recent EU study on disqualifications. In doing so an answer was formulated to the questions: "To what extent are offence diversities an obstacle for the taking account of prior convictions in the course of a *public procurement* procedure?" and "To what extent is it feasible to scope the taking account of prior convictions in a comprehensive, consistent and well-balanced way?"

The result of the analysis is included in the following publications:

- De Bondt, W. (in review). Cross-border recidivism in the EU: Fact or Fiction? Evaluating the supporting policy triangle. Punishment and Society.
- De Bondt, W. (2012). Rethinking public procurement exclusions in the EU. In G. Vermeulen, W. De Bondt, C. Ryckman, & N. Persak (Eds.), The disqualification triad. Approximating legislation. Executing requests. Ensuring equivalence. Antwerp-Apeldoorn-Portland: Maklu.[8]

[8] A Dutch counterpart is currently under review: De Bondt, W. (in review). Eerst de violen stemmen. Harmonieuze gunning van overheidsopdrachten in de EU. Panopticon.

An EU offence policy: needed and feasible

During the doctoral research it became clear (1) that offence diversities constitute a significant obstacle for some mechanisms whereas in other mechanisms member states consider it to be irrelevant, (2) that the current approach of dealing with the obstacles is not comprehensive, consistent nor well-balanced and (3) that it is nevertheless feasible to overcome the obstacles provided that the common criminalisation acquis is used as a basis. Overall, the doctoral thesis demonstrates the need for and feasibility of an EU offence policy that not only ensures that the common criminalisation acquis is continuously updated and easily available to all, but even more so subsequently uses the common criminalisation acquis to overcome the obstacles caused by the offence diversities in a comprehensive, consistent and well-balanced way. Therefore, the first part of the doctoral thesis aims at providing a concise but all-encompassing overview of the need for and feasibility of an EU offence policy, demonstrating the functioning thereof in relation to the different offence-dependent mechanisms that have been subject to analysis. Thereafter, the second part comprises the selected publications.

Part 1 – Need for and feasibility of an EU offence policy

Need for & feasibility of an EU offence policy

1 The common criminalisation acquis

The doctoral research underpinned that member states are struggling with the offence diversities in the EU. Not only the diversity in the criminalisation of offences, be also the diversity in the sanctioning of offences and diversity in the position of offences in the entirety of the judicial system. Because the doctoral research has demonstrated that knowledge on the criminalisation acquis can be the saviour, it is only logical for that common criminalisation acquis to be the backbone of EU policy making.

This first part of the needs and feasibility argumentation will point to the pitfalls when trying to identify the common criminalisation acquis and underline that it is not sufficient to look into approximation in the treaty-sense of the word, not even to approximation in the most extended interpretation of that word, but that there are also commonalities that have developed historically.

1.1 Diversity in the criminal codes

Criminal law is different in each of the member states. Because each member state has its own criminal code, what constitutes an offence in one member state does not necessarily constitute an offence in another member state. Traditionally, reference is made to ethical discussions to substantiate that.[9] The recurring discussions on decriminalisation of abortion and euthanasia can serve as an example. The choices underlying (de)criminalisation processes are said to touch upon the very heart of national integrity, identity and sovereignty.[10] It is considered very important that member states remain masters in their own house and retain the competence to decide what should and should not be included in their criminal code. Diversity needs to be accepted.[11]

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[9] See e.g. Cadoppi, A. (1996). Towards a European Criminal Code. European Journal of Crime, Criminal Law and Criminal Justice, 1, 2.

[10] See e.g. Sieber, U. (1993). Union Européene et droit pénal européen. Proposition pour l'avenir du droit pénal européen. Revue de science criminelle et de droit pénal comparé, 2, 262; Albrecht, P.-A., & Braum, S. (1999). Deficiencies in the Development of European Criminal Law. European Law Journal, 5(3), 292; Vogel, J. (2002). Why is harmonisation of penal law necessary? A comment. In A. Klip, & H. Van der Wilt (Eds.), Harmonisation and harmonising measures in criminal law (pp. 55-65). Amsterdam: Royal Netherlands Academy of Arts and Science, 55:

[11] In policy documents it is repeated time after time, that within the EU, the diversity amongst the legal systems must be accepted. See e.g. recently in the Stockholm programme. European Council (2010). The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens. OJ C 115 of 4.5.2010.

This does however not mean that there are no commonalities amongst those criminal codes. To the contrary, there are a number of offences or at least parts of offence that are commonly criminalised in the criminal codes of all EU member states. Those commonalities can be explained either from a *historical perspective* and have developed in each of the member states independently from one another based on a shared sense of justice (e.g. theft)[12], or from an *integration perspective*[13], originating from a joint commitment taken in an international or supranational context to legislate in a way that ensures that jointly identified behaviour is considered to be an offence in each jurisdiction (e.g. euro counterfeiting).[14] This latter technique is called approximation: through those commitments to ensure that the jointly identified behaviour is considered to be an offence, the criminal codes are *approximated*, i.e. brought closer together.

1.2 Approximation in the treaty-sense of the word

The original legal basis to approximate the criminal codes of the member states can be found in old Artt. 29, 31 and 34 TEU that allowed member states to adopt instruments with respect to the constituent elements of offences.[15]

> ***Art. 29 TEU*** *– Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the member states in the fields of police*

[12] Other *mala per se* crimes are reflected on in Ambos, K. (2005). Is the development of a common substantive criminal law for Europe possible? Some preliminary reflections. Maastricht Journal of European and Comparative Law, 12(2), 173.

[13] Criminal law is said to be used as a means to promote European integration. See e.g. Klip, A. (2006). European integration and harmonisation and criminal law. In D. M. Curtin, J. M. Smits, A. Klip, & J. A. McCahery (Eds.), European Integration and Law. Antwerp - Oxford: Intersentia.

[14] Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140 of 14.06.2000 *as amended by* the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 329 of 14.12.2001. See more generally Grandi, C. (2004). The Protection of the Euro against Counterfeiting. European Journal of Crime, Criminal Law and Criminal Justice, 12(2), 89; Mejborn, B. (2000). The protection of the Euro against counterfeiting. In G. De Kerchove, & A. Weyembergh (Eds.), Towards a European Judicial Criminal Area (pp. 273-276). Brussels: Editions de l' Universitié de Bruxelles.

[15] The articles also contain a legal basis for the adoption of minimum standards with respect to the sanctions involved. However, as the needs assessment focusses specifically on the development of an EU offence policy, the development of an EU sanction policy is not elaborated on.

> *and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.*
> *That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through [...] approximation, where necessary, of rules on criminal matters in the member states, in accordance with the provisions of Article 31(e).*
>
> ***Art. 31(e) TEU** – Common action on judicial cooperation in criminal matters shall include progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts [...] in the fields of organised crime, terrorism and illicit drug trafficking.*
>
> ***Art. 34.2(b) TEU** – [...] To that end, acting unanimously on the initiative of any member state or of the Commission, the Council may adopt framework decisions for the purpose of approximation of the laws and regulations of the member states. Framework decisions shall be binding upon the member states as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.*

Using these provisions as a legal basis, framework decisions have been adopted with respect to euro counterfeiting, fraud and counterfeiting of non-cash means of payment, money laundering, terrorism, trafficking in human beings, illegal (im)migration, environmental offences, corruption, sexual exploitation of a child and child pornography, drug trafficking, offences against information systems, participation in a criminal organisation and racism and xenophobia.[16]

[16] See more in detail: "Approximation: what's in a name?" in De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters.Moving beyond actors, bringing logic back, footed in reality. Antwerpen-Apeldoorn-Portland: Maklu.

An example of such an approximation provision is inserted below:

> *Each member state shall take the necessary measures to ensure that the following intentional conduct when committed without right is punishable: the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs.*[17]

Those approximation provisions have been widely commented on in literature. Approximation is often criticized for being used beyond the limits set out in the treaty provisions. Comparing the diversity in the offence labels covered in those instruments with the offence labels included in the above cited articles, it becomes clear that member states were rather flexible when interpreting that legal basis.[18] A strict reading of Art. 31 (e) TEU limits the scope of the competence to the approximation of organised crime, terrorism and drug trafficking. Read together with Art. 29 TEU trafficking in persons, offences against children, illicit arms trafficking, corruption and fraud can be added to the list. At least[19] that list of offences does not include money laundering, illegal

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[17] This example is copied from Art. 2.1 Framework decision of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking OJ L 335 of 11.11.2004.

[18] This position is elaborated on in De Bondt, W., & Vermeulen, G. (2009). Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 2, pp. 87-124). Antwerp - Apeldoorn - Portland: Maklu; See also: Vermeulen, G. (2002). Where do we currently stand with harmonisation. In A. Klip, & H. Van der Wilt (Eds.), Harmonisation and harmonising measures in criminal law (pp. 65-77). Amsterdam: Royal Netherlands Academy of Arts and Sciences.

[19] It can be argued that *participation in a criminal organisaion* is not included either because organised crime does not necessarily refer to an individual offence, but can be intended to refer to the modus operandi as is done in Art. 29 TEU. The various interpretations of organised crime have been subject to intense debate. See e.g. Mitsilegas, V. (2001). Defining Organised Crime in the European Union: The limits of European Criminal Law in an Area of Freedom, Security and Justice. European Law Review, 26(6), 565; Finckenauer, J. (2005). Problems of Definition: What is Organized Crime? Trends in Organized Crime, 8(3), 63; Von Lampe, K. (2008). Organized Crime in Europe: Conceptions and Realities. Policing, 2(1), 7; Symeanidou-Kastanidou, E. (2008). Towards a New Definition of Organised Crime in the European Union. European Journal of Crime, Criminal Law and Criminal Justice, 83. *Eurocounterfeiting* is also not mentioned as an offence label that can be subject to approximation, but is can be argued that it falls within the scope of the broad notion of fraud. As a counterargument it should be added that with respect to the approximation of offences realted to non-cash means of payment, an explicit destinction is made between counterfeiting and fraud. From that perspective eurocounterfeiting and counterfeiting of non-cash means of payment can be added to the list of

migration, protection of the environment, offences against information systems or racism and xenophobia,[20] that have also been subject to approximation. That critique has been (partially)[21] dealt with when redrafting the approximation articles for inclusion in the proposed Constitutional Treaty and later copied into the Lisbon Treaty. Since the entry into force of the Lisbon Treaty, the legal basis can be found in Artt. 82 and 83 TFEU.

> ***Art. 82 TFEU*** *– 1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the member states in the areas referred to in paragraph 2 and in Article 83.[...]*
> *2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the member states.*
> *They shall concern: (a) mutual admissibility of evidence between member states; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.*
> *Adoption of the minimum rules referred to in this paragraph shall not prevent member states from maintaining or introducing a higher level of protection for individuals.*

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offence labels that have been subject to approximation in spite of not being explicitly included in Art. 29 TEU.

[20] With respect to racism and xenophobia it can be argued that this offence label is included in the articles governing approximation, for it is mentioned in the first paragraph of Art. 29 TEU which refers to common action among the member states in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. However, that offence label is not explicitly repeated when elaborating on approximation as a means to achieve that objective.

[21] At least illegal immigration and racism and xenophobia are still not included in the list though they have been subject to approximation in the past.

> ***Art. 83 TFEU*** *– 1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.*
> *These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.*
> *On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.*
> *2. If the approximation of criminal laws and regulations of the member states proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76. [...]*

There are three main novelties in the new legal basis that influence the scope of approximation and thus the common criminalisation acquis for the future.

First, the new legal basis introduces a wider list of offence labels that can be subject to approximation, though the innovative character thereof should be nuanced in light of the framework decisions that had been adopted under the previous legal framework.[22] Considering that all of the listed offence labels have already been subject to approximation[23] it may seem as though the approximation targets have been reached and the technique will now only be used to revise the current instruments in light of new evolutions in crime as has

[22] This position is also included in: De Bondt, W., & De Moor, A. (2009). De Europese Metamorfose? De implicaties van het Verdrag van Lissabon voor het Europees Strafrecht. Panopticon, 1, 31.

[23] It should be noted that the trafficking of arms has not been subject to approximation in the strict sense of the word because no approximating framework decision has been adopted for this offence label. However, as will be argued in the following paragrapses, there is more to approximation than framework decisions alone. This offence label has been subject to approximation via the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the 2000 UN Palermo Convention (*infra* Approximation beyond the treaty).

recently been done with respect to trafficking in human beings[24] and sexual exploitation of children[25]. However, it is important to note that the Council can further develop the list, based on developments in crime.

Second, the adoption of common minimum standards for offences is also allowed with respect to any offence should this prove essential to ensure the effective implementation of a Union policy area that has been subject to harmonisation.[26]

Third, the possibility to approximate legislation is now explicitly extended to also include the approximation of aspects of procedural law. Though it may look as though the second paragraph of Art. 82 TFEU is not relevant for this discussion as it refers to approximation of aspects of *procedural law* as opposed to aspects of *substantive criminal law* involving the constituent elements of offences, the inclusion of the second paragraph can be important to the extent member states want to limit the introduction of those minimum standards to a set of offences identified as being particularly serious and thus in need for a higher level of cooperation and acceptance of EU intrusion also into the national procedural law.

1.3 Approximation beyond the treaty

However, a common criminalisation acquis comprising solely the result of approximation as it is included in those framework decisions and post-Lisbon directives will be judged for not being able to see further than the end of its *treaty* nose. It is important not to lose sight of the other possibilities to approximate. It has been argued several times that the acquis of what is common in terms of criminalisation extends well beyond the *approximation acquis* in the strict treaty-sense of the word. It has been explained that even a quick analysis of the approximation instruments *in the treaty-sense of the word*, reveals that the approximation acquis extends beyond those instruments.[27] The 2002 framework

[24] Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, OJ L 101 of 15.4.2011.

[25] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335 of 17.12.2011.

[26] See more elaborately: European Commission (2011), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM(2011) 573 final of 20.9.11.

[27] This position was already elaborated on in De Bondt, W., & Vermeulen, G. (2009). Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 2, pp.

decision on the facilitation of unauthorised entry, transit and residence[28] comes to testify to that conclusion.

Whereas the approximation of the penalties is included in that framework decision, the approximation of the constituent elements of the offence involved is included in a separate (formerly first pillar) directive[29], even though the treaty had appointed the framework decision as the legal basis for the approximation of the constituent elements of offences.[30] Furthermore, analysis revealed that within a European Union context, *approximation* has also been pursued via other instruments.[31] The Union has adopted e.g. conventions that contained approximation provisions.[32] Finally, it is important to underline that this approach still fails to take into account those approximation provisions adopted at other cooperation levels, amongst which the Council of Europe and the United Nations are the most significant. The importance of non-EU-instruments for the European Union is emphasized through the incorporation of some of them in the so-called JHA-acquis, which lists the legal instruments, irrespective of the cooperation level at which they were negotiated, to which all EU (candidate) member states must conform. This final extension of the approximation acquis is overlooked in most literature,[33] even though the European commission clearly argued that these instruments have acquired a position in the EU's JHA-acquis based on their position in EU legal and policy

87-124). Antwerp - Apeldoorn - Portland: Maklu. See also: "Approximation: what's in a name?" in De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters.Moving beyond actors, bringing logic back, footed in reality. Antwerpen-Apeldoorn-Portland: Maklu.

[28] Council Framework Decision of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 128 of 5.12.2002.

[29] Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

[30] The Directive of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96 of 12.4.2003 can also be mentionned *"as an exception"* here.

[31] This point has also been made by: Weyembergh, A. (2004). L'harmonisation des législations: condition de l'espace pénal européen et rélévateur de ses tensions (Collection "études européennes"). Brussels: Éditions de l'Université de Bruxelles.

[32] The most obvious example is the Convention of 26 July 1995 on the protection of the European Communities' Financial Interests, OJ C 316 of 27.11.1995.

[33] See more elaborately: De Bondt, W., & Vermeulen, G. (2009). Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 2, pp. 87-124). Antwerp - Apeldoorn - Portland: Maklu and De Bondt, W., & Vermeulen, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

documents. Reference can be made to the UN Single Convention on Narcotic Drugs which has acquired its position through the incorporation thereof in the EU Action Plan on Drugs (2000-2004).[34] As a result, consistent EU policy making requires that those approximation provisions too are taken into account.

There is much more to approximation than framework decisions and post-Lisbon directives. The diversity in approximation tools has as an advantage that approximation possibilities are very flexible; but it has as a disadvantage that the scattered and piecemeal approach is baleful for the clarity of the acquis and entails inherent consistency risks.[35]

1.4 An even wider common criminalisation acquis

Though approximation gives a fairly good overview of the common criminalisation amongst the criminal codes of the 27 member states, it still only reflects the commonalities from an *integration perspective*. It reflects those commonalities that are established based on the consideration that the diversity in the member states' criminalisation provisions created unwanted loopholes to the benefit of criminals. Approximation seeks to do away with those loopholes and bring the national criminal codes closer together.

However, there is much more common in terms of criminalisation than what is included in those approximation instruments. Everything that is already common due to the *historical development* of criminal law in the individual member states will not need to be subjected to *approximation* anymore and will thus not be found in the approximation instruments. Therefore, the approximation acquis is only a part of the wider common criminalisation acquis.

To the extent it can be useful or maybe even necessary to extend the knowledge on common criminalisation to overcome the obstacles, it should be considered to also identify what is already common as opposed to only creating new common offences.

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[34] This argumentation is used in European Commission (2009). Acquis of the European Union: Title IV of the TEC, Part II of the TEC, Title VI of the TEU. available on the website of the European Commission, p 30.

[35] Consistency not only with respect to the approximation of offences itself, but even more so with respect to the complementing provisions with respect to e.g. the organisation of jurisdiction, the inclusion of liablity of legal persons that are also included in the approximation instruments. The specific concerns with respect to the liability of legal persons have been dealt with in "Implications for the EU's approximation policy" in Vermeulen, G., De Bondt, W., & Ryckman, C. (2012). Liability of legal persons for offences in the EU. Antwerp-Apeldoorn-Portland: Maklu.

1.5 Range of offence-related diversities

Approximation (or common criminalisation more in general) does not do away with the diversity between the national criminal codes. Common criminalisation only leads to the establishment of a "socle commun" of constituent elements of offences.[36] Member states retain the competence to develop a more strict national regime and include also other behaviour underneath the same heading. Furthermore, the offence-related diversities between the criminal codes extend beyond the mere criminalisation of offences. Even where the offences are equally criminalised still significant differences can exist with respect to the sanctions that can be imposed (both in terms of nature and duration of the sanctions)[37] or the position the offence assumes in the (criminal)[38] justice system as a whole. A range of procedural provisions is offence-dependent in that e.g. some investigative measures can only be used with respect to some offences. Approximation does not change the fact that diversity should be accepted

Within the EU, there is no intention to work towards a unified EU criminal code.[39] Such a project could only be justified if there was a clear need for it or unanimous desire of the member states. Currently that is far from the case. For the years to come, there are 27 individual criminal codes with a number of offence-related commonalities and differences; offence-related meaning either with respect to the criminalisation, with respect to the sanction or with respect to the position of the offence in the (criminal) justice system as a whole.

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[36] This expression was used by the Work Group X "Freedom, Security and Justice" (2002). Final report of Working Group X "Freedom, Security and Justice". CONV 426/02 of 2.12.2002, 10.

[37] Claisse, S., & Jamart, J.-S. (2003). L'Harmonisations des sanctions. In D. Flore, S. Bosly, H. Brulin, S. Claisse, S. de Biolley, M.-H. Descamps, et al. (Eds.), Actualités de droit pénal européen (pp. 59-81). Brugge: La Charte; Lambert-Abdelgawad, E. (2002). L'Harmonisation des sanctions pénales en Europe: Étude comparée de faisabilité appliquée aux sanctions applicable, au prononcé des sanctions. Archives de politique criminelle, 1(24), 177.

[38] *Criminal* is placed between brackets because references to offences also appear in branches of law other than criminal law.

[39] See e.g. Spinellis, D. (2002). Harmonisation and harmonising measures in criminal law: Objections to harmonisation and future perspectices. In A. Klip, & H. Van der Wilt (Eds.), Harmonisation and harmonising measures in criminal law (pp. 87-95). Amsterdam: Royal Netherlands Academy of Arts and Sciences, 88. Ambos, K. (2005). Is the development of a common substantive criminal law for Europe possible? Some preliminary reflections. Maastricht Journal of European and Comparative Law, 12(2), 173. See however for ideas on partical unification: Delmas-Marty, M. (1997). Corpus Juris introducing penal provisions for the purpose of the financial interests of the European Union. Paris: Economica. Donà, G. (1998). Towards a European Judicial Area? A Corpus Juris Introducing Penal Provisions for the Purpose of the Protection of the Financial Interests of the European Union. European Journal of Crime, Criminal Law and Criminal Justice, 6(3), 282;

2 The saviour when diversity is an obstacle

The doctoral research underpinned that consistent EU policy making uses the knowledge on the common criminalisation acquis to its full potential and support member states were possible. It has demonstrated that the common criminalisation acquis can be the saviour when diversity is an obstacle. It is unfortunate that this function of the common criminalisation acquis is not recognised and currently limited to enhancing mutual trust and facilitating judicial cooperation, without detailing how that facilitating role should be understood let alone evaluating how it is put in practice. Especially when there is an endless list of questions on how to overcome the obstacles caused by offence diversities, there is a clear need for a comprehensive, consistent and well-balanced policy. This second part of the needs and feasibility argumentation briefly elaborates on the vague function of common criminalisation and the endless list of questions member states are confronted with.

2.1 Vague function of common criminalisation

Taking note of the offence diversities in the member states' legal systems, the question arises to what extent those diversities are an obstacle for EU policy making and what the function of the common criminalisation acquis therein is/can/should be.

Because in the political and legal discourse common criminalisation is currently limited to *approximation*, the function thereof is currently elaborated on only in relation to approximation. Without a doubt, the main critique with respect to the current approximation efforts is the lack of a clear vision or policy plan on that function.[40] Firstly, the *legal* plan as represented by the text of the treaty provisions does not extend beyond stipulating that *judicial cooperation shall include approximation* based on *the nature or impact of such offences or from a special*

[40] This critique can be found in Albrecht, P.-A., & Braum, S. (1999). Deficiencies in the Development of European Criminal Law. European Law Journal, 5(3), 292; Weyembergh, A. (2005). The functions of approximation of penal legislation within the European Union. Maastricht Journal of European and Comparative Law, 12(2), 149; Herlin-Karnell, E. (2007). Recent Developments in the Area of European Criminal Law. Maastricht Journal of European and Comparative Law, 14(1), 15; Mitsilegas, V. (2009). The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice? European Law Review, 34(4), 523; Baker, E., & Harding, C. (2009). From Past imperfect to Future Perfect? A Longitudinal Study of the Third Pillar. European Law Review, 34(1), 25; Borgers, M. J. (2010). Functions and Aims of Harmonisation After the Lisbon Treaty. A European Perspective. In C. Fijnaut, & J. Ouwerkerk (Eds.), The Future of Police and Judicial Cooperation in the European Union (pp. 347-355). Leiden: Koninklijke Brill.

need to combat them on a common basis. In doing so, approximation is introduced in the context of judicial cooperation and has as its function the establishment of a common fight against such offences. Between the lines it can be read that approximation should be used to ensure that particularly serious offences are criminalised throughout the EU avoiding loopholes in the national criminalisation provisions. Secondly, complementing policy documents are not very specific either. In the Tampere Conclusions it is merely posited that better compatibility and more convergence between the legal systems of member states "*must be achieved*", without even clarifying the specific reason thereof.[41] It can only be assumed that there too, avoiding loopholes is the main objective. In the Hague programme, the topic receives more attention through the introduction of a separate heading dedicated to the approximation of law. The function of approximation is said to be the "*facilitation of mutual recognition and police and judicial cooperation in criminal matters having a cross-border dimension*",[42] without further detailing how that should be achieved or in what way approximation is facilitating. It is not clarified what should be understood by the facilitating role, whether or not it extends beyond facilitation via the increase of mutual trust as a result of approximation of law. In the Stockholm programme the same things are repeated again. *"The European Council considers that a certain level of approximation of laws is necessary to foster a common understanding of issues among judges and prosecutors"*.[43]

Because legal and policy documents are not very helpful in detailing the function of the common criminalisation acquis, a literature review was conducted. In literature there have been attempts to map the (possible) functions of approximation making a distinction between an autonomous and an auxiliary (supporting) function.[44]

[41] Point 5, Tampere European Council (15-16 October 1999). Conclusions of the Presidency. SN 200/1/99 REV 1.
[42] European Council (2004). The Hague Programme: strengthening freedom, security and justice in the European Union. OJ C 53 of 3.3.2005.
[43] European Council (2010). The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens. OJ C 115 of 4.5.2010.
[44] See e.g. Borgers, M. J. (2010). Functions and Aims of Harmonisation After the Lisbon Treaty. A European Perspective. In C. Fijnaut, & J. Ouwerkerk (Eds.), The Future of Police and Judicial Cooperation in the European Union (pp. 347-355). Leiden: Koninklijke Brill; Weyembergh, A. (2005). The functions of approximation of penal legislation within the European Union. Maastricht Journal of European and Comparative Law, 12(2), 149.

Firstly, the autonomous function of approximation refers to the self standing efforts to tackle new forms of crime[45] such as euro-counterfeiting and to gradually introduce equality for EU citizens when it comes to the qualification of their acts.[46] This autonomous function links in with the way the current legal basis for approximation is formulated. A purely autonomous function of approximation is received with scepticism. Even though ensuring the common criminalisation of particularly new forms of crime is important to avoid loopholes in the national criminal justice systems, there are far more important reasons to approximate (see *infra* with respect to the auxiliary functions) and the *equality* sought is dependent on much more than just the constituent elements of the offences. Furthermore, approximation and therefore knowledge on what is common in terms of criminalisation is always supporting for cooperation. An EU offence policy should focus on the auxiliary function of approximation.

Secondly, the auxiliary function links in with what is found in policy documents and refers to the supporting role approximation can have for the smooth functioning of EU level actors[47] and judicial cooperation in criminal matters[48].

The link between approximation of offences and the EU level actors is clarified by referring to the definition of their mandates. It is argued that approximation helps to ensure that the competences of Europol and Eurojust *can be clearly defined*[49], but does not introduce a formal requirement to use the approximation acquis to that end. The function does not extend beyond the mere

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[45] See e.g. Borgers, M. J. (2010). Functions and Aims of Harmonisation After the Lisbon Treaty. A European Perspective. In C. Fijnaut, & J. Ouwerkerk (Eds.), The Future of Police and Judicial Cooperation in the European Union (pp. 347-355). Leiden: Koninklijke Brill, 349; Bosly, S., & Van Ravenstein, M. (2003). L'Harmonisation des incriminations. In D. Flore, S. Bosly, H. Brulin, S. Claisse, S. de Biolley, M.-H. Descamps, et al. (Eds.), Actualités de droit pénal européen (pp. 19-58). Brugge: La charte, 20

[46] This function is also characterised as the macro-level function of approximation. See Klip, A. (2006). European integration and harmonisation and criminal law. In D. M. Curtin, J. M. Smits, A. Klip, & J. A. McCahery (Eds.), European Integration and Law. Antwerp - Oxford: Intersentia, 139.

[47] This function is also characterised as the micro-level function of approximation. See Klip, A. (2006). European integration and harmonisation and criminal law. In D. M. Curtin, J. M. Smits, A. Klip, & J. A. McCahery (Eds.), European Integration and Law. Antwerp - Oxford: Intersentia, 140.

[48] This function is also characterised as the meso-level function of approximation. See Klip, A. (2006). European integration and harmonisation and criminal law. In D. M. Curtin, J. M. Smits, A. Klip, & J. A. McCahery (Eds.), European Integration and Law. Antwerp - Oxford: Intersentia, 140.

[49] See e.g. Borgers, M. J. (2010). Functions and Aims of Harmonisation After the Lisbon Treaty. A European Perspective. In C. Fijnaut, & J. Ouwerkerk (Eds.), The Future of Police and Judicial Cooperation in the European Union (pp. 347-355). Leiden: Koninklijke Brill, 349.

establishment of that potential link. Furthermore, it would make more sense to first establish the *need* to have common offences as a basis for the definition of the mandates of the EU level actors and where such a need exists, critically evaluate the actual use of the approximation acquis to that end. Where necessary recommendations need to be formulated.[50]

The link between approximation of offences and judicial cooperation is clarified by referring to the *increase of the mutual trust* that is necessary for the smooth functioning of judicial cooperation. Especially the introduction of mutual recognition has increased the perceived need for approximation.[51] Approximation does not necessarily lead to more trust though. It establishes what is common in terms of criminalisation between the member states but leaves the door open for remaining criminalisation diversity which is ultimately the reason why there is no absolute trust between the member states and why obstacles exist. Approximation will not do away with the differences between the member states and therefore approximation will not create absolute trust with respect to criminalisation. The opposite may be true. The behaviour subject to approximation reflects the political agreement reached between the member states. Criminalisation of what is not included may be politically sensitive.[52] Moreover, trust caused by the extended common criminalisation acquis and the reduction of the criminalisation diversity may be helpful in situations where criminalisation diversity is no legal obstacle to cooperation and cooperation with respect to cases for which the underlying behaviour is not equally criminalised in all cooperating states is ultimately a political decision taken by each of the member states individually, that trust is useless in situations where there is a legal obstacle that formally limits cooperation to situations that relate to the common criminalisation of offences beyond the choice of the individual member state. The idea that cooperation is facilitated if the differences are not too great[53] is a too narrow appreciation of the offence-related obstacles found in the legal

[50] This will be elaborated on below and has been dealt with extensively in: "EULOCS and EU level actors" De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters.Moving beyond actors, bringing logic back, footed in reality. Antwerpen-Apeldoorn-Portland: Maklu.

[51] Vogel, J. (2002). Why is harmonisation of penal law necessary? A comment. In A. Klip, & H. Van der Wilt (Eds.), Harmonisation and harmonising measures in criminal law (pp. 55-65). Amsterdam: Royal Netherlands Academy of Arts and Science; Mitsilegas, V. (2009). The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice? European Law Review, 34(4), 523.

[52] Reference can be made to the exclusion of drug trafficking for own personal use from the EU minimum definition.

[53] See e.g. Borgers, M. J. (2010). Functions and Aims of Harmonisation After the Lisbon Treaty. A European Perspective. In C. Fijnaut, & J. Ouwerkerk (Eds.), The Future of Police and Judicial Cooperation in the European Union (pp. 347-355). Leiden: Koninklijke Brill, 349.

framework that governs cooperation. Cooperation in criminal matters is in need of a thorough analysis of the extent to which member states are free to decide to either or not cooperate with respect to cases for which the underlying behaviour is not equally criminalised. With respect to the situations that are limited along a double criminality requirement, the common criminalisation acquis should be used to its full potential to avoid a deadlock in international cooperation in criminal matters.

2.2 Endless list of questions

There is an endless list of questions on the effect of the diversity in the member states' legal systems. In a globalizing world and developing European Union which promotes free movement,[54] criminal justice systems frequently meet. Criminal justice systems meet when confronted with a foreign career criminal. Questions arise with respect to the possibilities to seek *cross-border cooperation* to gather evidence, i.e. whether or not another member state has to execute a request for an investigative measure if the underlying behaviour is not criminalised in that member state, or the investigative measure is not possible in relation to that offence in a mere domestic situation in the executing member state. Questions arise with respect to the *functioning of the EU level actors*, i.e. whether the scope of their mandate needs to be limited to and cannot exceed the common criminalisation acquis. Questions arise with respect to the *value of his foreign prior convictions* when deciding on the nature and duration of the sanction in the sentencing stage, i.e. whether or not a foreign conviction can/should have an aggravating effect if the underlying behaviour is not equally criminalised in the prosecuting member state. Questions arise with respect to the possibilities to *seek cross-border execution* of the newly imposed sanction, i.e. whether or not the member state of the person's nationality can be asked/required to execute the conviction if the underlying behaviour is not equally criminalised in that member state or that particular type of sentence could not have been imposed (for that duration) for that offence in a mere domestic situation; Criminal justice systems meet when a convicted persons applies for a job in another member state. Questions arise with respect to the *impact of the convictions on the future career* of the person involved, i.e. whether or not a member state can/should limit the access to certain so-called vulnerable professions[55] if a person is convicted for

[54] Art 3.1 TEC clarified that the backbone of the European development was formed by the elimination of internal borders and the establishment of an internal market governed by free movement principles. See more generally on this topic: Barnard, C. (2007). Chapter 11 - Introduction to the Free Movement of Persons. In C. Barnard (Ed.), The Substantive Law of the EU (pp. 249-307). Oxford: Oxford University Press.

[55] A selection of particularly vulnerable professions is elaborated on in Vermeulen, G., Vander Beken, T., De Busser, E., & Dormaels, A. (2002). Blueprint for an EU Criminal Records Database.

behaviour that is not equally criminalised in the employing member state or the conviction involved an access-limitation that could not have been imposed (for that duration) for that offence in a mere domestic situation; and whether the appreciation of prior convictions changes/should change in light of the influence of the functioning of the internal market e.g. when looking into the value of prior convictions to assess the eligibility of candidates to participate in a public procurement procedure dominated by the equal treatment principle.

These are all legitimate questions that are to a greater or lesser extent linked to the *offence* involved; either the *behaviour* involved and whether or not that behaviour is considered to be a criminal offence, or the *sanction* involved or the *position* of the offence in the (criminal) justice system. An approximation policy that merely seeks to increase mutual trust between the member states will not suffice to provide a clear and consistent answer to those questions and will not help member states when cooperation is not allowed beyond common criminalisation.

Furthermore, criminal justice systems also meet on a more managerial level. Diversity in criminalisation also raises questions from an indirect more managerial point of view. Member states have grown to be keen on comparing the efficiency of their criminal justice systems and crime rates with those of other member states. However, the comparability of criminal justice data is compromised by the criminalisation diversity: a difference in the behaviour underlying the statistical data will compromise the comparability thereof.[56] Moreover, where it can be accepted for member states to limit the cross-national comparisons to data for which comparability can be guaranteed, such a limitation is not acceptable when the EU is evaluating its criminal policy. The EU as a full partner in criminal policy making can be held accountable for failing to organise the availability of the data it needs. The diversity in criminalisation is affecting the statistical data flow to the EU. Member states cannot guarantee that the data they are providing is comparable and constitutes a reliable base for EU level analysis. This compromises the evidence base the EU needs to uphold the credibility of EU level criminal policy making. Today, some of the above mentioned questions have been answered[57], others are left unanswered[58]; some

Legal, politico-institutional and practical feasibility. (Vol. 13, IRCP-series). Antwerp - Apeldoorn: Maklu.

[56] A similar argumentation has been made in relation to the estimation of the costs of crime and the difficulties with respect to cross-national comparisons due to diversity in the underlying national offences. See Ortiz de Urbina, I., & Ogus, A. (2009). Offence Definitions for Cost of Crime Estimation Purposes. European Journal on Criminal Policy and Research, 15, 343.

[57] The degree to which cross-border execution of sentences can be made dependent on a double criminality requirement and thus refused if the underlying behaviour does not constitute an offence in the executing member state is regulated in the corresponding EU instruments.

of them have been shifted to the choice and responsibility of the individual member states[59], others have been dealt with at EU level.[60] The lack of an integrated comprehensive approach has resulted in a system that is inconsistent[61], at times not executable[62] and far from well-balanced.

2.3 An EU offence policy

The sheer diversity of principles and mechanisms of which the functioning is to a greater or lesser extent linked to offence labels, potentially dependent on the commonality thereof, calls for a helicopter view and the development of an overarching EU offence policy using the common criminalisation acquis as the centre piece. This doctoral research has underpinned that there is a need for an EU offence policy that effectively tackles obstacles caused by offence-related diversities. Such policy should not aim to unify, but should focus on approximating and further developing the common criminalisation acquis where necessary and above all accept diversities, appreciate commonalities and align policies accordingly. There is a need for a holistic approach that includes all principles and mechanisms that are offence-related.

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[58] The degree to which exclusion from participation in a public procurement procedure can be made dependent on a double criminality requirement is currently not regulated at EU level.

[59] The extent to which taking account of prior convictions in the course of a new criminal procedure is limited along a double criminality requirement is the decision of each individual member state.

[60] The degree to which cross-border execution of sentences can be made dependent on a double criminality requirement and thus refused if the underlying behaviour does not constitute an offence in the executing member state is regulated in an EU instrument.

[61] The same offence label does not always refer to the same underlying behaviour. Different instruments are (intended to be) based on different offence definitions. Reference can be made to the offence labels as they appear in the Europol list and in in Art. 40(7) and Art. 41(4)(a) of the Schengen Implementation Convention. For the definition of the offences on the Europol list, it is explicitly stated that they shall be assessed by the competent national authorities in accordance with the national law of the member states to which they belong. There are strong indications that an entirely different interpretation is envisioned in SIC. When updating the Art. 40(7) SIC list to include participation to a criminal organisation and terrorism, references to the 1998 joint action (OJ L 351 of 29.12.1998) and the 2002 framework decision (OJ L 164 of 22.6.2002) were included. In doing so the SIC list tends towards the use of common offence concepts as included in the EU JHA acquis. As a result, mirroring offence concepts have a different meaning across instruments.

[62] The level of detail in the current criminal records exchange mechanism is not sufficient to apply to offence-based provisions in some cooperation instruments or provisions in legislation governing the effect of prior convictions.

This need for a comprehensive approach that includes all principles and mechanisms that are offence-related means that it is not sufficient to build an EU offence policy around the traditional judicial cooperation in criminal matters[63], extended with police cooperation[64] and the functioning of actors such as Europol and Eurojust. A consistent and comprehensive EU offence policy requires that this is extended to all domains that have a link with offences in their scope or application conditions, i.e. from crime statistics to taking account of prior convictions, even beyond criminal procedures, such as the taking account of prior convictions to apply the rules with respect to offence-related exclusion grounds found in public procurement instruments. The entirety of the EU body of legal instruments needs to be scanned for references to offences or to ways of dealing with the offence diversities.

As a result, this doctoral thesis holds a strong argumentation to develop an EU offence policy that is both needed and feasible. In literature it has been argued that it is difficult to determine the direction in which the member states, the European Commission and the Council wish to go.[65] This doctoral thesis contains a number of detailed suggestions and a warm appeal to intervene immediately where necessary.

[63] Most authors limit the discussion on the complexity created by criminalisation diversity to judicial cooperation in criminal matters. See e.g. Weyembergh, A. (2005). The functions of approximation of penal legislation within the European Union. Maastricht Journal of European and Comparative Law, 12(2), 149. This is largely due to the fact that approximation is inserted into the treaty under the heading of judicial cooperation.

[64] Other authors have argued that police cooperation should be included in the scope. See e.g. Vervaele, J. A. E. (2004). Europeanisering van het strafrecht of de strafrechtelijke dimensie van de Europese integratie. Panopticon, 3, who's argumentation is supported in De Bondt, W., & Vermeulen, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu. Along the same line of argumentation we have argued, in the context of a recent study, that the distinction between police and judicial cooperation is artificial and outdated. Vermeulen, G., De Bondt, W., & Ryckman, C. (2012). Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality.

[65] See e.g. Klip, A. (2006). European integration and harmonisation and criminal law. In D. M. Curtin, J. M. Smits, A. Klip, & J. A. McCahery (Eds.), European Integration and Law. Antwerp - Oxford: Intersentia, 138.

3 To ensure comparability of crime statistics

The first obstacle identified relates to the comparability of crime statistics. Therefore, the first function for the common criminalisation acquis that will be elaborated on is ensuring the comparability of crime statistics.

The *need* for cross-national comparable crime statistics has been widely recognised both from a national as well as from an EU criminal policy perspective. Crime statistics are a vital part of criminal policy making. To be able to ensure cross-national comparability, data needs to be limited to relate only to what is commonly criminalised. The *feasibility* of that approach is currently compromised by the limits in the level of detail in the national data systems and the freedom to choose an implementation strategy to comply with approximation obligations. Those two concerns reflect the need for the policy to be adjusted. The doctoral research underpinned the feasibility of ensuring comparable crime statistics, provided that the level of detail in the national data systems is increased and the freedom to choose an implementation strategy is reconsidered.

3.1 Recognising the need for comparable crime statistics

The needs assessment to tackle the obstacles caused by offence diversities has started in 2008, in the context of an EU study on the feasibility of attaining comparable crime statistics between the member states of the EU.[66] That is the reason why comparability of crime statistics is dealt with as the first function for the common criminalisation acquis.

The compilation of EU level crime statistics has been an official EU objective for more than 15 years. Even though a lot has happened in that time span, limited progress has been made. The importance of comparable crime statistics is consistently reiterated in policy documents, e.g. in the 1997 Action Plan to combat organised crime,[67] in the 1998 Vienna Action Plan,[68] in the 2000

[66] The report of the study was published as: Mennens, A., De Wever, W., Dalamanga, A., Kalamara, A., Kaslauskaite, G., Vermeulen, G., De Bondt, W. (2009). Developing an EU level offence classification system: EU study to implement the Action Plan to measure crime and criminal justice (Vol. 34, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

[67] European Council (1997). "Action plan to combat organised crime." OJ C 251 of 15.8.1997

[68] Council and Commission (1998) "Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice", OJ C 19 of 23.01.1999.

Millennium Strategy,[69] in the 2003 Dublin Declaration,[70] in the 2005 The Hague Programme,[71] in the 2006 Commission Communication on the EU Action Plan to measure crime and criminal justice[72] and in the 2010 Stockholm programme. *"Adequate, reliable and comparable statistics are a necessary prerequisite, inter alia, for evidence-based decisions on the need for action, on the implementation of decisions and on the effectiveness of action."*[73]

3.2 First things first: developing EULOCS

Though the comparability of crime statistics is dependent on more aspects than the underlying offence,[74] comparative criminologists maintain that the diversity in criminalisation remains the most important reason why cross-national comparability of crime statistics is almost impossible.[75] It soon becomes clear that the current approximation policy and the functions attributed to approximation cannot lead to comparable crime statistics. *"An increased mutual trust"* between the member states with respect to the criminalisation of offences is not what is needed here. Comparable crime statistics require that a clear cut distinction can be made between what is common (and thus comparable) and what is different (and thus not comparable).

[69] European Council (2000). "The prevention and control of organised crime: a European Union strategy for the beginning of the new millennium." OJ C 124 of 3.5.2000

[70] Council or the European Union (2003). "Declaration of the Dublin Conference on Organised Crime." Doc 16302/03, CRIMORG 96, 19.12.2003

[71] European Council (2004). "The Hague Programme: strengthening freedom, security and justice in the European Union." OJ C 53/11 of 3.3.2005.

[72] European Commission (2006). "Commission Communication to the European Parliament, the Council and the European Economic and Social Committee: Developing a comprehensive and coherent EU strategy to measure crime and criminal justice: An EU action Plan 2006-2010." COM(2006) 437 final of 07.08.2006

[73] European Council (2010). The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens. OJ C 115 of 4.5.2010.

[74] See more in detail: Robert, P. (2009). Comparing Crime Data in Europe. Official crime statistics and survey based data (Criminologische studies). Brussels: VUBPress; Aebi, M. (2008). Measuring the Influence of Statistical Counting Rules on Cross-National Differences in Recorded Crime. In K. Aromaa, & M. Heiskanen (Eds.), Crime and Criminal Justice Systems in Europe and North America 1995-2004 (pp. 196-215). Helsinki: HEUNI; Barclay, G. (2000). The comparability of data on convictions and sanctions: are international comparisons possible? European Journal on Criminal Policy and Research, 8, 13.

[75] Harrendorf, S. (2012). Offence Definitions in the European Sourcebook of Crime and Criminal Justice Statistics and Their Influence on Data Quality and Comparability. European Journal on Criminal Policy and Research, 18, 23.

Based on that concern, the 2008 EU study started off with the clarification of commonalities in criminalisation.[76] Knowledge on what is common in terms of criminalisation in the member states will lead to knowledge on the limits of comparable crime statistics. That is the logical first step when attempting to attain comparable crime statistics. To that end, the common criminalisation acquis – composed of any type of instrument relevant to EU policy making in which member states have committed themselves to ensuring the criminalisation of the included offences – was mapped and classified in an EU level offence classification system, named EULOCS.[77] To clearly differentiate between what is common and what is different, the architecture of EULOCS distinguishes between *jointly identified parts* of offences and *other parts* of offences.[78] Through clickable links the definitions of the jointly identified offences appear, complemented with a reference to the legal instrument that holds the legal basis for the joint identification. In doing so, the common criminalisation acquis was clearly visualised and ready to be used as a basis for the delineation of the limits of comparable crime statistics. It is important to underline that EULOCS does not reflect the largest common denominator of available crime statistics, but the largest common denominator of criminalisation delineating the limits of comparable crime statistics.[79]

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[76] Within a team of 5 researchers, I was responsible for the work package that aimed at clarifying the known commonalities in criminalisation.

[77] Initial reflections on the building blocks of a statistical Esperanto based on a thorough legal analysis were published as De Bondt, W. & Vermeulen, G. (2009). Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 2, pp. 87-124). Antwerp - Apeldoorn - Portland: Maklu. A preliminary version of EULOCS was discussed with peers at various international conferences (e.g. 2008 ESC in Edinburgh, 2009 Stockholm Symposium, 2009 EUROSTAT expert meeting) and with member state representatives during focus group meetings in the member states. The final product was originally published as Vermeulen, G. & De Bondt, W. (2009). EULOCS. The EU level offence classification system : a bench-mark for enhanced internal coherence of the EU's criminal policy (Vol. 35, IRCP-series). Antwerp – Apeldoorn – Portland: Maklu.

[78] See more in detail on the pittfalls and the importance thereof for crime statistics: De Bondt, W., & Vermeulen, G. (2010). Revolutions in EU Crime Statistics: EULOCS - the EU level offence classification system. In L. Pauwels, & G. Vermeulen (Eds.), Actualia strafrecht en criminologie (Vol. 4, pp. 473-493). Antwerp-Apeldoorn-Portland: Maklu.

[79] In the past EULOCS has been criticised for not being able to support actual gathering of comparable crime statistics because it does not take account of the limits represented by the level of detail in the national data systems. See Savona, E., Lewis, C., & Vettori, B. (2005). EUSTOC, Developing an EU STatistical apparatus for measuring Organised Crime, assessing its risk and evaluation organised crime policies (Vol. 11). Trento: Transcrime. However, that critique fails to appreciate that the ultimate goal is to provide an overview of what could be used as a limit to ensure the comparability of crime statistics as a opposed to what can now be used to collect comparable crime statistics. Furthermore, as will be elaborated on in the

To visualise this approach a snapshot of EULOCS is inserted. In doing so a first important step towards an EU offence policy was taken: the much needed visualisation of the commonalities in criminalisation.

0200 00 Open Category	PARTICIPATION IN A CRIMINAL ORGANISATION
0201 00	OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION
0201 01	**Directing a criminal organisation**
0201 02	**Knowingly participating in the criminal activities,** *without being a director*
0201 03	**Knowingly taking part in the non-criminal activities of a criminal organisation,** *without being a director*
0202 00	OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION

Immediately though, a huge restriction for the establishment of the limits of comparable crime statistics surfaces. Because the legal basis for the common criminalisation acquis is currently limited to the approximation acquis, the jointly identified parts of offences in EULOCS reflect the approximation acquis. The main limit of an approximation-based EULOCS relates to the main limit of the current approximation strategy. Approximating instruments are used to *ensure* the joint criminalisation of a serious offence with a cross-border dimension for the *future*. They are not used to *identify* what is *already* commonly criminalised in the criminal codes of the member states. As a result the approximation acquis is only the tip of the iceberg of common offences in the EU.[80] Because it is felt that common criminalisation can only be useful if it requires that at least some member states have to change their national criminal code, approximation is focussed on creating new common offences. The idea that a more extended common criminalisation acquis can be useful to delineate the scope of comparable crime statistics did not get airborne yet. The possibility to extend the scope of comparable crime statistics accordingly might spark the interest of the member states to also delineate what is already common and subsequently include it in EULOCS.

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following paragraphs, the argument that member states cannot produce the data requested is not acceptable in relation to some of the jointly identified parts of offences.

[80] It has been argued that the approximation acquis gives a false sense of common criminalisation due to incomplete and inconsistent implementation in the member states. See more elaborately on that discussion in: "Building a classification system" in De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters.Moving beyond actors, bringing logic back, footed in reality. Antwerpen-Apeldoorn-Portland: Maklu.

The limited scope of the *jointly identified parts* of offences is only a minor drawback though. Additionally, there are more fundamental concerns with respect to the level of detail in the information systems and the freedom to choose an implementation strategy when approximating offences.

3.3 Level of detail in the national data systems

Though it may be expected that comparative criminologists use the common criminalisation acquis as a basis to delineate the scope of the comparability of crime statistics, analysis revealed that another approach is used. Comparative criminologists such as e.g. the members of the European Sourcebook group[81] are confronted with diversity in the national data systems. The level of detail included therein is not sufficient to isolate statistical data that relate to the common criminalisation acquis. Alternatively, using the organisation of the national data systems as a baseline, an alternative definition is come up with; a definition that does not reflect the limit of common criminalisation but reflects what comes *as close as possible* to a common definition member states can provide data for.[82] As a result, data needs to be complemented with a member state comment clarifying the extent to which the data provided still deviates from that proposed definition.[83] This approach does not result in perfectly comparable crime statistics but in a data set that is as close to comparability as possible, combined with a number of caveats to point to the incomparabilities. Though *academics* are powerless when confronted with the drawbacks in the national data systems and are forced to work with what is there, it is inacceptable for a *policy maker* responsible for the architecture of the data systems to use that same argumentation to justify why comparability between crime statistics cannot be achieved.

Obviously, the feasibility of using the largest (known) common denominator amongst criminalizations as a basis to scope cross-national comparisons of crime statistics is fully dependent on the ability of member states to isolate statistical data that represent that common denominator. The ability to put theory into practice is dependent on the level of detail in the national data systems. To be

[81] This group was used as an example because of their significance in the field of statistical data collection. This does not mean however that there are no other initiatives that have tackled the difficulties related to the criminalisation diversity in another way. Reference can be made to the initiatives working with victim surveys in which no legal definitions of crimes appear.

[82] Harrendorf, S. (2012). Offence Definitions in the European Sourcebook of Crime and Criminal Justice Statistics and Their Influence on Data Quality and Comparability. European Journal on Criminal Policy and Research, 18, 23.

[83] See for a detailed description of that approach Killias, M., Aebi, M., Aromaa, K., Aubusson de Cavarlay, B., Barclay, G., Gruszczyñska, B., et al. (2006). The European Sourcebook of Crime and Criminal Justice Statistics – 2006. Den Haag: WODC.

able to assess the scope of the comparability problem, empirical data has been gathered in the 2008 study on crime statistics to compare the level of detail in the national data systems with the required level of detail to provide data that matches the largest (known) common denominator amongst criminalizations as included in EULOCS. The results revealed that the current level of detail is a major stumbling block to put theory into practice.[84]

Ultimately it is the responsibility of the member states to decide whether or not the potential of comparing crime statistics is worth the effort to increase the level of detail in the national data systems to be able to provide data that match the largest common denominator as included in EULOCS. Crime statistics are more than a pile of numbers. They are an essential tool in the fight against crime.[85] Having reiterated once more that *"adequate, reliable and comparable statistics are a necessary prerequisite, inter alia, for evidence-based decisions on the need for action, on the implementation of decisions and on the effectiveness of action,"*[86] the need for comparable crime statistics at least of the EU priority offences[87] is uncontested and consistent and comprehensive policy making requires that the level of detail in the national data systems is adapted accordingly.

3.4 Freedom to choose implementation strategies

In light thereof, the liberty member states currently have when it comes to the implementation of approximation obligations can be questioned. That is the second fundamental concern that needs to be dealt with. When implementing the approximation instruments, some member states introduce separate offences that mirror the EU minimum criminalisation, whilst others incorporate the minimum standards in existing offences that may be more broad than the EU minimum obligation. The adoption of minimum standards does not prevent member states from upholding a more strict criminalisation policy at national

[84] Representatives of the police authorities in each of the 27 member states were asked to identify for which of the jointly identified parts of offences in EULOCS corresponding statistical data could be produced. See more in detail: Mennens, A., De Wever, W., Dalamanga, A., Kalamara, A., Kaslauskaite, G., Vermeulen, G., De Bondt, W. (2009). Developing an EU level offence classification system: EU study to implement the Action Plan to measure crime and criminal justice (Vol. 34, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

[85] Stamatel, J. (2009). Contributions of Cross-National Research to Criminology at the Beginning of the 21st Century. In M. D. Krohn (Ed.), Handbook on Crime and Deviance (pp. 3-22): Springer; Maguire, M. (2007). Crime data and statistics. In M. Maguire, R. Morgan, & R. Reiner (Eds.), The Oxford Handbook of Criminology (pp. 241-301). Oxford: Oxford University Press.

[86] European Council (2010). The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens. OJ C 115 of 4.5.2010.

[87] A possible selection of priority offences was elaborated on in De Bondt, W. (in review). Evidence based EU criminal policy making: in search of valid data. European Journal on Criminal Policy and Research.

level.[88] These more strict policies can cause problems with respect to the comparability of crime statistics. The relation between the Belgian definition and the EU minimum definition of trafficking in human beings can clarify that position. The EU minimum definition stipulates that acts of trafficking in human beings are punishable where use is made of coercion, force or threat, including abduction [...].[89] That requirement represents the minimum standard. At least situations where use is made of coercion, force or threat, criminalisation must be ensured. Nothing prevents the member states from introducing a more strict offence definition that even criminalises acts of trafficking in human beings where no use is made of coercion, force or threat. That is the liberty that was used in the Belgian definition of trafficking in human beings. The use of coercion, force or threat is not included as a constituent element.[90] It is irrelevant to Belgian law, as a result of which a judge will never look into the use of coercion, force or threat let alone mention it in the verdict. This is problematic when Belgium is asked to provide statistical data that match the EU minimum definition and therefore only relate to convictions for trafficking in human beings where use was made of coercion, force or threat. This is a distinction the Belgian authorities will not be able to make as a result of the implementation strategy that was chosen. Therefore a policy that seeks to ensure comparable crime statistics requires that the extent to which member states are free to choose an implementation strategy is subject to debate.

3.5 Policy needs and feasibility

The need for comparable crime statistics at EU level has been recognised for over 15 years. That need is left unanswered because the member states are unable to provide comparable data. The choice to call upon the EU to support the fight against some forms of crime is far from non-committal. If EU intervention with respect to some crime phenomena is sought, comprehensive and coherent policy making includes a strategy to ensure the availability of comparable crime statistics, the importance of which is repeatedly reiterated in policy documents. Using EULOCS as a basis, it can easily be catalogued for which *jointly identified parts* of offences member states should be able to provide comparable statistical data. With this case study on crime statistics and the importance thereof for EU policy making, the first anchors in the needs assessment for an EU offence policy have been placed.

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[88] This policy consideration is now explicitly included in Art. 83 TFEU.

[89] Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ L 20 of 1.8.2002; Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, OJ L 101 of 15.4.2011.

[90] Art. 433*quinquies-novies* Belgian criminal code.

4 To avoid redundant double criminality testing

The second obstacle identified relates to avoiding redundant double criminality testing. Therefore, the second function for the common criminalisation acquis as presented in EULOCS that will be elaborated on is avoiding redundant double criminality testing.

Analysis revealed that member states are struggling with the double criminality requirement. On the one hand, double criminality is deemed important but a practical need is formulated to avoid time-consuming double criminality testing where that is redundant. On the other hand, double criminality is deemed outdated in an evolving Union in light of extensive approximation efforts. Nevertheless, abandonment of the double criminality requirement altogether for the related offence labels proved inacceptable as shown by the recent compromis to complement the abandonment with the possibility to issue a declaration not to agree to it. The latter possibility is criticized for undermining the approximation acquis.

This doctoral research demonstrated the necessity and feasibility of restoring the balance in the double criminality policy, provided that a clear distinction is made between cases for which double criminality testing is redundant and cases for which double criminality testing is acceptable.

4.1 Linking common criminalisation to double criminality

Though the needs assessment of an EU offence policy started in the context of a crime statistics study, first and foremost approximation (or common criminalisation more in general) is brought in relation to double criminality as a refusal ground in international cooperation in criminal matters.

It is said that "the most effective weapon against all forms of crime is cooperation,"[91] be it that cooperation is hindered by the differences in criminalisation. Member states have made the functioning of some forms of cooperation dependent on the condition that the underlying behaviour is equally criminalised in their member state.[92] Not so much the question whether

[91] Quote from Flynn, V. (1997). Europol - A Watershed in EU Law Enforcement Cooperation? In G. Barrett (Ed.), Justice Cooperation in the European Union: The Creation of a European Legal Space (pp. 79-113). Dublin: Institute of European Affairs.

[92] See more detailedly on the double criminality requirement for each of the 7 domains that comprise international cooperation in criminal matters: De Bondt, W. (2012). Double criminality

or not a double criminality requirement is introduced – ultimately, the member states decide whether or not they are willing to cooperate beyond double criminality – but rather how that requirement is developed, delineated and implemented is subject to critical analysis. The weapon needs to be loaded with a policy that makes clever use of the common criminalisation acquis.

Limiting the function of the approximation acquis – and the common criminalisation acquis more in general – to the establishment of a certain degree of equality between the criminal law systems of the member states that "helps to create the mutual trust necessary for cooperation",[93] does not go into the relationship between double criminality and common criminalisation. Therefore it should be applauded that in the Stockholm Programme the Council invites the Commission to further explore *"the relationship between approximation of criminal offences or their definition and the double criminality rule in the framework of mutual recognition"*.[94] The Commission is invited to make a report to the Council on this issue. "*One of the issues may be the necessity and feasibility of approximation or definition of criminal offence for which double criminality does not apply*." It should be noted that a distinction is made between on the one hand approximation as a specific technique to create new common offences and avoid loopholes in the national criminal codes and on the other hand the more general definition of criminal offences that could relate to the establishment of what is already common and to which double criminality should not apply. This links in perfectly with the suggestion made to extend the knowledge on common criminalisation to in parallel extend the scope of possible comparable crime statistics.

The following paragraphs elaborate on what could be the main lines of argumentation in the Commission report to the Council.

4.2 Different double criminality mechanisms

Two double criminality mechanisms can be found in the current body of international instruments. First, there is the traditional double criminality

in international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality (pp. 86-159). Antwerp-Apeldoorn-Portland: Maklu.

[93] Borgers, M. J. (2010). Functions and Aims of Harmonisation After the Lisbon Treaty. A European Perspective. In C. Fijnaut, & J. Ouwerkerk (Eds.), The Future of Police and Judicial Cooperation in the European Union (pp. 347-355). Leiden: Koninklijke Brill; Weyembergh, A. (2005). The functions of approximation of penal legislation within the European Union. Maastricht Journal of European and Comparative Law, 12(2), 149.

[94] European Council (2010). The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens. OJ C 115 of 4.5.2010.

requirement limiting cooperation to situations where the underlying behaviour is criminalised in all participating member states. Second, there is the introduction of a list of 32 offences for which double criminalisation is assumed and the testing therefore abandoned,[95] be it that in more recent instruments the provisions governing that abandonment have been complemented with the possibility for member states to issue a declaration stipulating not to agree with that abandonment through which the double criminality requirement can be reintroduced.[96]

Though the decision to either or not limit cooperation based on a double criminality requirement is entirely up to the member states, a comprehensive approximation policy does make sure that this refusal ground cannot be used in relation to offences that have been subject to approximation.[97] Allowing such refusal would amount to allowing an infringement of the approximation commitments. It is important to explicitly include this limit in double criminality provisions in the instruments governing international cooperation in criminal matters. At least that consideration should be included when elaborating on the relationship between approximation and the double criminality rule in mutual recognition instruments. Double criminality is inacceptable where approximation exists and additionally, the common criminalisation acquis can be further developed should member states wish to extend the basis for the abandonment of the double criminality verifications.

In practice this means that it is even more important to have an easily accessible permanently updated overview of the common criminalisation acquis so that an issuing / requesting authority can verify whether the case for which international cooperation is sought does or does not relate to *jointly identified parts* of offences. If such would be the case, the cooperation request includes the reference to the EULOCS category for a *jointly identified part* of an offence, a categorisation that should be recognised by the executing / requested member state. If such would not be the case, the cooperation request includes the

[95] The introduction of the list of 32 offences for which double criminality is abandoned is often characterised as the most controversial feature of mutual recognition. See e.g; Alegre, S., & Leaf, M. (2003). Chapter 3: Double Criminality. In S. Alegre, & M. Leaf (Eds.), European Arrest Warrant - A solution ahead of its time? (pp. 34-52): JUSTICE - advancing justice, human rights and the rule of law; van Sliedregt, E. (2009). The Double Criminality Requirement. In N. Keijzer, & E. van Sliedregt (Eds.), The European Arrest Warrant in Practice (pp. 51-70). The Hague: T.M.C. Asser Press. Cameron, I. (2011). Double Criminality under pressure. In U. Andersson, C. Wong, & H. Örnemark Hansen (Eds.), Festskrift till Per Ole Träskman. Stockholm: Norstedts.

[96] Art 23.4 EEW, Art 14.4 FD Supervision, Art. 7.4. FD Deprivation of Liberty.

[97] See more in detail: "EULOCS & double criminality" in De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters.Moving beyond actors, bringing logic back, footed in reality. Antwerpen-Apeldoorn-Portland: Maklu.

references to the EULOCS category for *other parts* of offences and sufficient detail with respect to the underlying behaviour should be provided to allow the executing / requested member state to conduct a double criminality verification. Not only does this approach safeguard the approximation acquis, it also ensures that member states do not have to engage in a redundant double criminality verification if the underlying behaviour is known to be criminalised throughout the EU and identified as such in EULOCS. It will be more sufficient to have an initial double criminality verification in the issuing / requesting member state as opposed to dedicating that task to the executing / requested member state who is not (necessarily) as acquainted with the case (yet).

At first sight, it seems as though the recommendation with respect to the unacceptability of double criminality as a refusal ground in relation to offences that have been subject to approximation is complied with through the introduction of a list of 32 offences for which double criminality verification is no longer acceptable. When comparing the offence labels that have been subject to approximation through the adoption of framework decisions and post-Lisbon directives with the offence labels included in the 32 offence list, it appears that double criminality verification is already abandoned for all labels that have been subject to approximation. However, this position cannot be supported, not only because there is more to approximation than framework decisions and post-Lisbon directives as a result of which the current approximation acquis already extends way beyond the labels included in the 32 offence list,[98] but maybe even more so because this approach cannot stand the test of time. Especially now Art. 83 TFEU introduced an open-ended scope limitation to approximation because the Council can always add more offence labels to the list of offences that may be subject to approximation and approximation can also be used with respect to any other offence should approximation be necessary to ensure the efficient enforcement of EU policies, it is only a matter of time before new approximation instruments *sensu stricto* will be adopted beyond the offence labels included in the list. The ongoing preparations with respect to the approximation of offences regarding market abuse and market manipulation are the perfect example thereof.[99] Finally, the possibility for member states to issue a declaration renouncing the abandonment of the double criminality requirement effectively undermines the whole idea. From an approximation policy perspective, the

[98] When looking into the approximation acquis in 2008, no less than 62 offence labels were identified. See more elaborately: De Bondt, W., & Vermeulen, G. (2009). Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 2, pp. 87-124). Antwerp - Apeldoorn - Portland: Maklu.

[99] Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, of 20.10.2011.

introduction of an unlimited possibility to issue a double criminality declaration is rather unfortunate. This policy choice was clearly not well-balanced.

4.3 Policy needs and feasibility

Through the policy choices that have been made recently when adopting instruments governing international cooperation in criminal matters, member states have expressed the need to reconsider the position of the double criminality requirement. The approach as currently developed is not received as satisfactory. It is feasible however, to accommodate at least part of the concerns by using the common criminalisation acquis.

If member states wish to maintain the double criminality *requirement* but abandon double criminality *verification* where it is redundant, the knowledge on the common criminalisation acquis should be used to its full potential. It can support the member states in identifying for which cases double criminality verification is redundant due to knowledge on common criminalisation.

Though it was never expressly mentioned as a need, the analysis revealed the need to better safeguard the approximation acquis. Inconsistencies arise where member states are allowed to raise a double criminality issue where a double criminality obligation exists. The approximation acquis as presented in EULOCS has the potential to accommodate that need. It is feasible to safeguard the approximation acquis by inserting a standard provision in instruments governing international cooperation in criminal matters stipulating that double criminality testing is not acceptable where approximation exists as visualised in EULOCS.

5 To overcome evidence gathering difficulties

The third obstacle identified relates to the evidence gathering difficulties. Therefore, the third function for the common criminalisation acquis as presented in EULOCS that will be elaborated on is overcoming evidence gathering difficulties.

Cross-border gathering and use of evidence is challenging due to significant differences between the member states' legal systems. The member states expressed the need for EU intervention through inserting a legal basis thereto in Art. 82 (2) TFEU. The doctoral research underpinned that clever use of the common criminalisation acquis can support discussions on the feasibility to reduce the recourse to offence-limits to use e.g. investigative measures as a

refusal ground. Furthermore, it can be a guideline when delineating the scope of the minimum standards developed to ensure admissibility of evidence.

5.1 Offence-limits to the use of investigative measures

The possibility to use the approximation acquis beyond the abandonment of the double criminality requirement was first looked into in the context of the EU study on the laws of evidence.[100] In the European evidence warrant it is stipulated that offence-limits to the use of investigative measures are not acceptable for house search and seizure in relation to the 32 listed offences.[101] The existence of offence-limits to the use of investigative measures refers to the situation where – though having equally criminalised the offence involved – the specific investigative measure is not available in the national law of the executing member state for that specific offence.

The opportunity was used to first test the political feasibility of the suggestions made with respect to the double criminality requirement. The policy option to link the abandonment of the double criminality requirement to the approximation acquis as opposed to an undefined set of 32 offence labels was received favourably. Furthermore, along that same line of argumentation member states where asked whether they considered it to be an acceptable future policy option to extend the unacceptability of offence-limits as a refusal ground also to other investigative measures if the scope of the unacceptability mirrored the approximation acquis. This policy option too was considered to be acceptable.

In light of the acceptability of that policy option, a coherent and consistent EU policy would have strived to equally introduce such a limitation in the use of the refusal ground when elaborating on the refusal grounds in the European investigation order (EIO). Art. 10 of the current political agreement elaborates on the refusal grounds.[102] According to Art. 10. 1b. (b) cooperation can be *refused* if

[100] In a questionnaire sent to representatives of each of the member states, it was asked to elaborate on the extent to which the use of refusal grounds could be limited making use of the approximation acquis.The final report of that study was published as Vermeulen, G., De Bondt, W., & Van Damme, Y. (2010). EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? (Vol. 37, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

[101] Art 14.2. resp. 11.3 (ii) Framework decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters OJ L 350 of 30.12.2008.

[102] See: Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European

the use of the measure is restricted under the law of the executing state to a list or category of offences or to offences punishable by a certain threshold, which does not include the offence covered by the EIO. Using the limitation of that refusal ground in the EEW as a baseline, complemented with the political feasibility that was demonstrated in the study on the laws of evidence, which was subsequently endorsed by the member states at a Commission expert meeting[103], it would have been logical to stipulate either that member states must legislate in a way that makes the listed investigative measures available for the offences that have been subject to approximation, or to stipulate that this offence-limit inspired refusal ground is inacceptable in relation to offences that have been subject to approximation regardless of the relation between the approximated offences and the investigative measures in the national law.

5.2 Minimum standards to ensure mutual admissibility of evidence

Additionally, the EU study on the laws of evidence looked into the obstacles with respect to the cross-border admissibility of evidence gathered abroad and the possible role for the approximation acquis or more generally the common criminalisation acquis therein. The differences in evidence gathering techniques and the consequences for the admissibility of evidence have for long been subject to debate. The solutions introduced so far have not been able to fully tackle the obstacles. Principles such as *forum regit actum* according to which the evidence gathering member state must live up to the procedures and formalities requested by the member state in which the court proceeding will take place, have been criticized for neglecting the problems related to existing evidence and for failing to ensure EU-wide admissibility due to a focus on the one-on-one situation between the evidence gathering and prosecuting member state.[104] The only alternative consists of introducing minimum standards for the gathering of evidence complemented with a *per se* admissibility of evidence gathered accordingly. Using the legal basis introduced in Art. 82.2(a) TFEU minimum standards can be adopted to ensure mutual admissibility of evidence between the member states; it can be agreed which criteria should be met before the result of e.g. a house search is admissible as evidence in any court throughout

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Investigation Order in criminal matters - Text agreed as general approach. Doc 18918/11 of 21.12.11.

[103] European Commission Expert Conference: Experts on Evidence, Brussels 9.2.2010.

[104] See more elaborately: "EULOCS & admissibility of evidence" in De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters.Moving beyond actors, bringing logic back, footed in reality. Antwerpen-Apeldoorn-Portland: Maklu.

the EU. Admittedly, there is *not necessarily* a link with the common criminalisation acquis, but there could be, if member states prefer a gradual approach.

The question has indeed arisen what the scope of this policy option should be; whether it should be limited to offences that are prioritised for representing the most serious offences with a cross-border dimension and were subject to approximation, or should also apply to any other offence. From an EU policy perspective it is important to at least ensure that with respect to those serious offences with a cross-border dimension that have been subject to approximation, evidence gathering is organised in a way that ensures admissibility throughout the EU and in doing so ensures the effective fight against those offences. Ultimately the treaty based function of approximation is linked to *"the need to combat them on a common basis"*.[105] An effective fight may need a larger common basis than only a common criminalisation commitment. A more comprehensive policy is required.

The legal basis provided for in Art. 82.2 TFEU is not limited to *offences* with a cross-border dimension, but to *cooperation* with a cross-border dimension. Therefore, it will not at all be a problem to introduce minimum evidence gathering standards in a way that ensures cross-border admissibility of evidence with respect to the offences that are prioritised in the EU offence policy. Whether those minimum rules will also be introduced for other offences needs to be recommended, but ultimately is a choice of the member states. More importantly, the formulation of that legal basis does raise questions with respect to the possibility to introduce minimum standards with respect to the gathering of evidence for the priority offences in a mere domestic situation. What starts out as a seemingly mere domestic situation can always amount to a cross-border situation in the course of a criminal investigation. It is not uncommon that proceedings are subsequently transferred to another member state. Therefore, it is also important to ensure that evidence gathered nationally upon a national initiative (as opposed to evidence gathered in execution of a cross-border cooperation request) is mutually admissible as well. At least for offences that reflect the EU priorities, it should be considered to introduce such minimum standards anyhow. The questionable legal basis for minimum standards with respect to evidence gathering mirrors the questionable legal basis for minimum standards with respect to the rights of individuals in criminal proceedings. In that context, member states agreed to also introduce the procedural safeguards in a mere domestic situation.[106]

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[105] This function is included in Art. 83 TFEU.

[106] See also: Spronken, T., Vermeulen, G., de Vocht, D., & van Puyenbroeck, L. (2009). EU Procedural Rights in Criminal Proceedings. Antwerp-Apeldoorn-Portland: Maklu; Van

5.3 Policy needs and feasibility

Member states have recognised the need to rethink cross-border evidence gathering and admissibility of evidence. The fight against crime needs more than approximation to be effective. There are various ways in which the common criminalisation acquis as reflected in EULOCS could be supportive. When member states want to reduce the use of offence-limits as a refusal ground as introduced in the European evidence warrant, it is recommended that the current policy is redirected in a way that ensures consistency throughout the instruments governing evidence gathering and avoids that the acquis reached in previous instruments is lowered in new instruments.

A comprehensive policy to effectively fight crime on a common basis requires that admissibility of evidence is secured where necessary through the adoption of minimum standards to the extent the differences in the current national mechanisms are an obstacle for admissibility.

6 To clarify the mandates of the EU level actors

The fourth obstacle that was identified relates to the clarification of the mandates of the EU level actors. Therefore, the third function for the common criminalisation acquis as presented in EULOCS that will be elaborated on is clarifying the mandates of the EU level actors.

The need to clarify the mandates has been identified and approximation has been brought up in that discussion. However the assertion that "approximation also helps to ensure that the competences of institutions such as Europol and Eurojust *can be clearly defined*"[107], is not sufficiently developed and needs to be complemented with a thorough analysis first and foremost on the scope of the need for definition and where that need is established on the actual use of the approximation acquis to that end. This doctoral research has underpinned the need to delineate information exchange obligations and the so-called stronger

Puyenbroeck, L., & Vermeulen, G. (2010). Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union. In M. Cools, B. De Ruyver, M. Easton, L. Pauwels, P. Ponsaers, G. Vande Walle, et al. (Eds.), EU and International Crime Control (Vol. 4, pp. 41-62). Antwerpen-Apeldoorn-Portland: Maklu; De Bondt, W., & Vermeulen, G. (2010). The Procedural Rights Debate. A Bridge Too Far or Still Not Far Enough? . EUCRIM(3), 163.

[107] Quote from Borgers, M. J. (2010). Functions and Aims of Harmonisation After the Lisbon Treaty. A European Perspective. In C. Fijnaut, & J. Ouwerkerk (Eds.), The Future of Police and Judicial Cooperation in the European Union (pp. 347-355). Leiden: Koninklijke Brill.

powers and pointed to the feasibility to use the common criminalisation acquis to that end.

6.1 No general need to clarify the mandates

The need to clarify the mandates is dependent on the specific task of the EU level actor. If the task is limited to *one individual case* following the choice of a member state to call upon the EU level actor for coordination, the delineation of the mandated offences is not vital for the EU level actor to be able to properly support the member state request. It can be argued that the possibility for the member states to call upon the EU level actors for help should not be limited based on common offence definitions. A member state confronted with a cross-border terrorism case should be allowed to seek e.g. the coordinating support from Eurojust even where the specific form of terrorism involved falls outside the scope of the approximation acquis and is not criminalised throughout the EU. For its coordinating tasks the offence labels are indicative and the scope of the task dependent on the national definition of the offence labels.

The situation changes however as soon as the functioning of the EU level actor exceeds an individual case and extends to *cross-case analyses* as is expected from the EU level actors when they are tasked with drawing up annual reports on specific crime phenomena.[108] In addition thereto, a clearly defined mandate is even more important to delineate the so-called *stronger powers.*

6.2 Delineating information exchange obligations

Conducting a reliable analysis on the data received from the member states with respect to such a specific crime phenomenon, requires that the data set is both complete and consists of comparable data. The concerns raised with respect to the comparability of crime statistics apply *mutatis mutandis* also to this situation. It is widely accepted that neither of both criteria can be guaranteed based on the current data flow to the EU level actors.[109] The information flow to EU level actors is problematic. At present, it is entirely left to the member states' discretion to decide which cases fall within the scope of the mandates and is

[108] Reference can be made to TE-SAT, the EU Terrorism Situation and Trend Report drawn up by Europol or to OCTA, the Europol Organised Crime Threat Assessment,

[109] In the past OCTA has been criticised for working with incomplete data sets. See e.g. Vettori, B. (2006). Comparing data sources on organized crime across the EU: a first step towards an EU statistical apparatus. In P. van Duyne, A. Maljević, M. van Dijck, K. Von Lampe, & J. L. Newell (Eds.), The organization of crime: conduct, law and measurement (pp. 43-68). Nijmegen: Wolf Legal Publishers; van Duyne, P. (2010). Organised Crime (Threat) as a Policy Challenge: a Tautology. Varstvoslovje, Journal of Criminal Justice and Security, 4, 355.

therefore sent on to the EU level actors, and which cases are deemed irrelevant for the EU level actors. As a result, no one really knows to what extent the data included in the information systems is complete and comparable. Based on those concerns, changes in the legal framework and organisation of the data flow are looked into. With respect to Eurojust, the new Art. 13.6 of the Eurojust Decision introduces a mandatory information sharing. It stipulates that *"member states shall ensure that their national member is informed without undue delay of any case in which at least three member states are directly involved and the offence involved [...] is included in the following list: trafficking in human beings, sexual exploitation of children and child pornography, drug trafficking, trafficking in firearms, their parts and components and ammunition, corruption, fraud affecting the financial interests of the European Communities, counterfeiting of the euro, money laundering and attacks against information systems."* Through this provision, it is hoped to tackle problems of incomplete data sets. Though it is commendable that the problems with the information flow are recognised and attempts are made to accommodate the problems, it is unfortunate that this opportunity was not seized to clearly delineate the scope of the obligation to pass on information and in doing so accommodate the problems of comparability of data raised at several occasions. Instead of merely referring to an offence label and leaving the definition thereof to the discretion of the member states, it be recommended to clearly delineate the scope of the offence labels using the approximation acquis as a guideline. In that respect, the approach used to delineate *participation in a criminal organisation* as a mandated offence in the original 2002 Eurojust Decision can be recalled. In Art. 4 of the original 2002 Eurojust Decision the scope of participation in a criminal organisation was delineated by referring to the 1998 joint action approximating that offence. In doing so, the scope of the mandated offence was crystal clear as was the scope of the information obligation in relation thereto. However, that technique was not perfect. It has been argued that defining the scope of the offences by copy pasting references to approximation instruments into other EU instruments, cannot stand the test of time,[110] because the approximation acquis is not static but rather in constant evolution. The joint action referred to has been repealed by a framework decision as a result of which a reference thereto would be outdated. Because the

[110] See more elaborately on this critique: "EULOCS and EU level actors" in De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters.Moving beyond actors, bringing logic back, footed in reality. Antwerpen-Apeldoorn-Portland: Maklu and previously also in De Bondt, W., & Vermeulen, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

approximation acquis changes so rapidly, the easiest way[111] to guarantee a consistent policy is to lift the scope delineation of offence labels out of the EU instruments and alternatively include a reference to EULOCS instead. As opposed to complementing each of the offence labels mentioned in Art. 13.6 Eurojust Decision with a reference to a framework decision, a post-Lisbon Directive or any other approximation instrument, it gets preference to complement the provision stipulating that *'the offence labels are to be defined as indicated in EULOCS'*. This can easily be achieved by complementing the EULOCS categorisation with a column in which the scope of the information exchange obligations pursuant to Art. 13.6 Eurojust Decision is indicated.

Additionally, it can be recommended to upgrade the (bilateral) communication channels currently used by the member states in such a way that ensures that information for those selected (parts of) offences is automatically forwarded to relevant EU level actors, at least in such a way that ensures that the EU level actors receives a notification of the fact that communication with respect to one of its mandated offences is ongoing between member states.

This recommendation links in with the discussions currently held not only with respect to the development of EPRIS, the European Police Records Index System that is currently subject to a feasibility study[112], but also with respect UMF II, short for Universal Message Format II as currently discussed in DAPIX, the Working Party on Information Exchange and Data Protection.

The main goal of EPRIS is the creation of an index system that allows law enforcement authorities to communicate more easily and test – via a hit/no-hit system – whether their counterparts in other EU member states have information that could be relevant to the case they are working on. All index systems have some common fields; regardless of what the specific focus of the index system is, there will always be offence fields. There are a lot of advantages of using EULOCS as the backbone of the offence fields in the index system. To streamline the information exchange with the EU level actors, any communication system is built around an offence categorisation that mirrors the delineation of information exchanged obligations allows a swift organisation of a parallel information flow to the EU level actors. With respect to a system such as EPRIS, designing the system in that way ensures that automatic notifications are sent to the EU level actors when member states communicate with respect to any of the mandated offences for which a mandatory information exchange

[111] It is of course possible to keep the references updated and amend the instruments each time the approximation acquis is changed, but past examples have shown that there are always references that are overlooked. It gets preference to develop a policy that avoids these risks.

[112] The final report on the study on possible ways to enhance efficiency in the exchange of police records between the Member States by setting up a European Police Records Index System (EPRIS) awarded to Unisys and IRCP, is due in August 2012.

obligation is introduced. This is where EULOCS has a significant added value. Not only will it allow member states to distinguish between cases that relate to the *jointly identified parts* of offences which may be necessary for the correct application of some national provisions (cfr. offence-limitations touched upon above), it can also ensure correct communication with the EU level actors. If EULOCS with its *jointly identified parts* of offences is used to identify for which offences information must be sent to the EU level actors and at the same time EULOCS is also used as the backbone of the offence fields in the index system, the connection can easily be made. Information can be sent to the EU level actor without it requiring any additional effort of the authorities involved. Furthermore, the same scope limitation can be used to allow the EU level actors access to EPRIS by means of allowing them to enter their own query, specifically limited to the offences within their mandate.

A similar suggestion has been made to DAPIX, the Working Party on Information Exchange and Data Protection, currently discussing the Universal Message Format II, an integrated gateway that combines the templates of all exchange mechanisms into one uniform interface.[113] The idea behind UMF II starts from the observation that a lot of the communication channels use similar templates, at least have a large number of common fields in their templates. Here too, the suggestion was made to use EULOCS as the backbone of the offence related fields in the uniform template, which was received favourably. It will support communication between the member states as it will allow them to differentiate between cases that relate to *jointly identified parts* of offences and other cases, and it will allow the creation of a technicality that sends a copy to *in casu* Europol where the case relates to an offence included in its mandate as opposed to having to manually put Europol in copy as is done now e.g. in Sienna. Additionally, the same uniform gateway could be used by Europol to send its own queries to the member states seeking to assess whether or not the national authorities hold information with respect to those defined mandated offences.

6.3 Delineating the strong powers

Especially when actors are awarded autonomous (semi)-operational powers, the delineation of those powers in light of the offences they relate to is considered to be extremely important. The idea to award Eurojust the power to initiate criminal investigations, as well as proposing the initiation of

[113] On 8 March 2011 the UMF2 kick-off meeting took place in The Hague. See Europol (2011) Progress Report on the implementation of the EUROPOL led action points related to the IMS action list DOC 9074/11 of 14.4.2011 and the provisional agenda of the DAPIX meeting of 28 March 2012, CM 1769/12 of 15.3.2012, for the ongoing topics of debate.

prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union as foreseen in Art. 85.1(a) TFEU or to take binding decisions with respect to positive conflicts of jurisdiction as foreseen in Art. 85.1(c) TFEU also calls for a clear scope demarcation of the offences involved. In light thereof, it is important to underline that the scope of those so-called *stronger powers* does not have to encompass the entire approximated offence. Consistent policy making does not mean that the same definition is copied all the time. Consistent policy making requires that there is a clear and well considered link between all scope delineations featuring in EU policies. That is the reason why the idea launched by the European Parliament back in 2002 with respect to the delineation of the Europol mandate to introduce an automatic link between approximation and mandated offences in that the offence labels would be automatically redefined in light of the approximated definition for that offence label,[114] cannot be supported. As argued above in relation to the delineation of the offence labels in Art. 13.6 of the Eurojust decision, it is possible to select only some of the *jointly identified parts* of offences depending on the competence involved.

6.4 Policy needs and feasibility

Though the need to clarify the mandates of the EU level actors has been repeatedly subject to debate, this doctoral research pointed to the fact that there is no general need to clarify the mandates. Not all tasks required a strict delineation along the common criminalisation acquis. Where there is a need, there is a clear added value to using the knowledge on the common criminalisation acquis and the *jointly identified parts* of offences as a guideline. Referring to undefined offence labels cannot overcome the problems currently experienced with the information exchange to EU level actors. It is perfectly feasible to overcome these problems using the EULOCS categorisation as a basis.

Furthermore, the introduction of stronger powers will only be deemed acceptable by the member states if those powers are clearly delineated. The current *label approach* is not considered to be an option. EULOCS categorisation is an acceptable alternative. Using a EULOCS which clearly represents the approximation acquis and distinguishes between *jointly identified parts* of offences and *other parts* of offences, and even further differentiates between *different categories* of jointly identified parts of offences, is a feasible way for this

[114] European Parliament legislative resolution on the initiative of the Kingdom of Belgium and the Kingdom of Sweden with a view to adopting a Council decision extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, OJ C 140/E of 13.6.2002.

scope demarcation to be done in a clear, consistent and above all transparent way.[115]

7 To support the identification of the equivalent sentence

The fifth obstacle that was identified relates to the identification of the equivalent sentence. Therefore the fifth function for the common criminalisation acquis that will be elaborated on is the support for the identification of the equivalent national sentence.

The doctoral research underpinned that though it has not been explicitly expressed in any policy document or literature, here too, there is a need to develop a strategy to overcome the obstacles caused by offence diversities. The feasibility of using the common criminalisation acquis to that end, is dependent on the level of detail in the conviction information.

7.1 Adaptation complexity

Knowing which offence a case relates to remains important throughout the criminal procedure all the way to the sentence execution stage. International cooperation in criminal matters also encompasses the instruments that govern the cross-border execution of sentences. Those instruments too contain double criminality provisions – the acceptability of which should be excluded for offences that have been subject to approximation. In addition thereto, the instruments governing cross-border execution contain so-called adaptation provisions. Whenever the nature or duration of the sentence is incompatible with the law of the executing member state, the latter may adapt the sentence in accordance with its national law.[116] Practitioners repeatedly expressed their concern with respect to the feasibility of correctly applying the adaptation provisions.[117]

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[115] The idea to use EULOCS to delineate the competences of EU level actors was picked up in a doctoral thesis specifically focussing on Europol. See e.g. De Moor, A., & Vermeulen, G. (2010). The Europol council decision: transforming Europol into an agency of the European union. Common Market Law Review, 47(4), 1089.

[116] This mechanism is foreseen in Art. 8 FD Financial Penalties, Art. 8 Deprivation of Liberty, Art. 9 FD Alternatives and Art. 13 FD Supervision.

[117] This concern was amongst others raised during the member state missions for the study on the future of international cooperation in criminal matters, as well as during the ERA training session on "*Exchange of information from criminal records and taking into account convictions in the*

- Art. 8.1 FD Fin Pen stipulates that [...] *the executing state may decide to reduce the amount of the penalty enforced to the maximum amount provided for acts of the same kind under the national law of the executing state, when the acts fall within the jurisdiction of that state;*
- Art. 8.2 and 3 FD Deprivation of liberty stipulate that *[w]here the sentence is incompatible with the law of the executing state in terms of its duration, the competent authority of the executing state may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law* and *[w]here the sentence is incompatible with the law of the executing state in terms of its nature, the competent authority of the executing state may adapt it to the punishment or measure provided for under its own law for similar offences;*
- Art. 13.1 FD Supervision stipulates that *[i]f the nature of the supervision measures is incompatible with the law of the executing state, the competent authority in that member state may adapt them in line with the types of supervision measures which apply, under the law of the executing state, to equivalent offences;* and
- Art 9.1 FD Alternatives stipulates that *[i]f the nature or duration of the relevant probation measure or alternative sanction, or the duration of the probation period, are incompatible with the law of the executing state, the competent authority of that state may adapt them in line with the nature and duration of the probation measures and alternative sanctions, or duration of the probation period, which apply, under the law of the executing state, to equivalent offences*.

The correct application of those adaptation provisions requires that sufficiently detailed information is provided on the offence involved to allow the executing member state to compare the imposed sentence with the sentence that is foreseen in its national law.

7.2 Policy needs and feasibility

The introduction of the cross-border execution mechanisms and the adaptation provisions therein need to be complemented with a policy that helps to identify cases that relate to the common criminalisation acquis and thus for which sentence equivalence testing can be automated. In light thereof, it has been argued that a reference to a specific EULOCS category when communicating the conviction to the executing member state can speed up the

EU" organized by ERA, Czech, Polish, Hungarian and Slovak Judicial Schools, held at the Czech Judicial Academy on 7.4.2011.

process of identifying the corresponding national sentencing provisions and support the application of the adaptation provisions.[118]

The need to include sufficiently detailed conviction information becomes even more apparent when looking into the application of the provisions governing the taking account of prior convictions.

8 To scope the taking account of prior convictions

The sixth obstacle identified relates to taking account of prior convictions. Therefore the sixth and final function for the common criminalisation acquis that will be elaborated on is scoping the taking account of prior convictions.

There is a whole range of so-called *prior conviction provisions*, i.e. legal provisions that are to a greater or lesser extent dependent on the existence and typology of a person's prior convictions. The doctoral research underpinned that the way the obstacles resulting from the criminalisation diversity need to be tackled varies according to the specific context. Though both perfectly feasible, the line of argumentation for the taking account of prior convictions in the course of a new *criminal procedure* differs from the line of argumentation for the taking account of prior convictions in the course of a *public procurement procedure.*

8.1 A range of prior conviction provisions

What immediately springs to mind when referring to the taking account of prior convictions, is that prior convictions are taken into account in the course of a new criminal procedure. The existence of prior convictions can have an effect in the different stages of that criminal procedure. At the pre-trial stage, the existence of prior convictions can influence amongst others the qualification of the facts, the application of the ne bis in idem principle and the decision on provisional detention. At the trial stage, the existence of previous convictions can influence amongst others both the type of the sanction as it may restrict the use of suspended sentences as well as the level of the sanction as a result of accumulation or confusion with the previous sanction. At the post-trial stage, the existence of prior convictions can influence amongst others the application of the

[118] See more elaborately "Lex mitior & equivalence of sentence/measure" in Vermeulen, G., De Bondt, W., & Ryckman, C. (2012). Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality and "Double criminality, sentencing equivalence and sentence execution" in Vermeulen, G., van Kalmthout, A., Paterson, N., Knapen, M., Verbeke, P., & De Bondt, W. (2011). Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures (Vol. 40, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

rules governing the execution of the sentence in that it may reduce the possibility to obtain adjustments of the sanction or be allowed early release.[119]

Furthermore, it is often overlooked that the effect of prior convictions also extends beyond the criminal procedure. Reference can easily be made to the fact that a certificate of non-prior conviction is required for a number of professions. So-called vulnerable sectors are protected in that persons with relevant convictions are excluded from being professionally active in those sectors. Previous research identified amongst others the educational and medical sector as being vulnerable.[120] Similar provisions excluding convicted candidates can also be found in public procurement regulations. Once convicted for an offence that has a functional link with procurement in general or the task underlying a specific public contract, a candidate will be deemed ineligible.

Though it may seem as though the reasoning is the same of all these examples, there is a fundamental difference between the public procurement case and all other examples mentioned. The rules governing the public procurement case are inextricably linked to the principles of the proper functioning of the internal market, which is dominated by amongst others a very strict equal treatment principle. Such an equal treatment principle is not found in the other examples mentioned. That consideration clarifies why both the taking account of prior convictions in the course of a new criminal procedure and the taking account of prior convictions in the course of a public procurement procedure were singled out for an in-depth analysis. In doing so, both a criminal and a non-criminal procedure is analysed; both a procedure that is and is not linked to the functioning of the internal market.

8.2 In the course of a new criminal procedure

Firstly, the taking account of prior convictions in the course of a new criminal procedure varies significantly throughout the EU because it is governed by the different provisions found in the national criminal justice systems of each of the member states. Because until recently those national provisions focused mainly

[119] This broad range of provisions that require information on the person's prior convictions is included in the explanation to Art. 3 Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. See more elaborately: Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, COM (2005) 91 final of 17.3.2005 included in Doc 7645/05, COPEN 60 of 30.3.2005.

[120] Vermeulen, G., Vander Beken, T., De Busser, E., & Dormaels, A. (2002). Blueprint for an EU Criminal Records Database. Legal, politico-institutional and practical feasibility. (Vol. 13, IRCP-series). Antwerp - Apeldoorn: Maklu.

on the effect of *national* convictions in the course of a new criminal procedure, they are complemented with the commitment – made in a framework decision – to attach to foreign EU convictions effects that are equivalent to the effects attached to national convictions.[121] It should be stressed that this commitment is not unlimited and not just any foreign EU conviction will (need to) be taken into account. What is relevant to establish the existence of obstacles caused by offence diversities, is the effect of foreign convictions for which the underlying behaviour is not criminalised in the member state hosting the new criminal procedure. The decision about the effect of such conviction is completely left to the discretion of the 27 individual member states. At EU level it was explicitly agreed that member states could not be obliged to take account of a foreign conviction that could not have existed in their own jurisdiction.[122] The choice to either or not take account of a foreign conviction for which the underlying behaviour does not constitute an offence in the prosecuting member state is dependent on the philosophy underlying the prior conviction provisions and whether the effect is linked to the offence or the sanction imposed. Some of those national provisions are sanction-dependent meaning that the effect of the prior conviction is dependent on the sanction imposed in the past. Provisions that only take account of the sanction imposed leave the door open to take account of convictions for which the underlying behaviour is not criminalised in the prosecuting member state. In those jurisdictions offence diversities are not necessarily an obstacle. Other national provisions are offence-dependent meaning that the effect of the prior conviction is dependent on the specific offence underlying the prior conviction. Only a specified combination of an old and new offence will fall within the scope of the prior conviction provisions. In those situations, taking account of a foreign conviction for which the underlying behaviour does not constitute an offence in the prosecuting member state is usually not possible.[123] As a result, offence diversities can be an obstacle for the correct application of the prior-conviction provisions in some member states. Consequently, comprehensive, consistent and well-balanced EU policy making requires that this obstacle is dealt with in parallel to introducing a taking account obligation.

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[121] Council of the European Union (2008). Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. OJ L 220 of 15.08.2008.

[122] Recital 6 of the framework decision.

[123] The only scenario where it remains possible to take account of a foreign conviction for which the underlying behaviour does not constitute an offence in the prosecuting member state relates to prior conviction provisions that refer to undefined offence labels as opposed to offence labels defined base don the national criminal code. See more elaborately: De Bondt, W. (in review). Cross-border recidivism in the EU: Fact or Fiction? Evaluating the supporting policy triangle. Punishment and Society.

The EU has now introduced an obligation which member states cannot live up to or at least are destined to struggle with. Analysis has revealed that a significant amount of the prior conviction provisions is offence-dependent meaning that member states have made the taking account of foreign convictions dependent on a double criminality requirement.[124] Foreign convictions will only be taken into account if the underlying behaviour is equally criminalised in the prosecuting member state. This means that the correct application of those provisions requires the availability of sufficiently detailed prior conviction information so that double criminality verification can take place. Precisely the level of detail in the criminal records information is where the EU has failed its member states. To obtain information on prior convictions, the EU has directed the member states to the existing criminal records information exchange mechanisms.[125] Even though the criminal records landscape has received an important facelift in recent years and ECRIS – short for the new European Criminal Records Information System – should be operational from April 2012 onwards, the new framework will not be able to support the member states when conducting the crucial double criminality verifications when seeking to live up to the commitment to take account of foreign convictions and attach effects thereto that are equivalent to the effects of a national conviction,[126] whilst still correctly applying the national prior conviction provisions.

It may be reasonably expected from the EU criminal records policy to have anticipated to this problem. More attention could have been paid to supporting double criminality verification when designing ECRIS considering that the taking account of prior convictions is to a large extent dependent on a double criminality requirement, especially since the importance thereof was elaborated on in expert meetings.[127] Therefore, the ECRIS coding system has been criticized for lacking the detail necessary to support double criminality verification. In parallel the potential of EULOCS was highlighted. One of the examples elaborated on in the course of the doctoral research relates to money laundering.

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[124] See more elaborately: De Bondt, W. (in review). Cross-border recidivism in the EU: Fact or Fiction? Evaluating the supporting policy triangle. Punishment and Society.

[125] Art. 3.1 FD Prior Conviction stipulates that prior convictions are to be taken into account "*in respect of which information has been obtained under applicable instruments on mutual legal assistance or on the exchange of information extracted from criminal records*".

[126] See more elaborately: "EULOCS & information exchange between member states" in De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters.Moving beyond actors, bringing logic back, footed in reality. Antwerpen-Apeldoorn-Portland: Maklu.

[127] This point was elaborated on e.g. during a meeting of the European Commission Sub Group of Experts on the Policy Needs for Data on Criminal Justice on 6 March 2008 and again on 4 February 2009.

Whereas ECRIS in its current format only includes one code for all types of money laundering, the use of the EULOCS coding system holds great potential for it includes a whole range of codes for the different types of money laundering, allowing that a distinction is made between a *jointly identified part* of money laundering that falls within the scope of the approximation acquis and is therefore known to meet the double criminality requirement, and *other parts* of money laundering, for which an additional description of the facts is necessary to allow double criminality verification. It is perfectly feasible to ask a convicting judge to always clarify what type of money laundering the conviction relates to. It could be made mandatory to include that kind of information in the national criminal records data bases and subsequently include it in the criminal records information that is exchanged. Especially in cases where the national prior conviction provisions stipulate that a prior conviction *must*[128] lead to an aggravation of the new sentence provided that the prior conviction relates to behaviour that is equally criminalised under its national law, the current exchange of criminal records information via ECRIS creates a deadlock. The lack of detail in the current criminal records information makes it impossible to correctly apply the national prior conviction provisions in the course of the new criminal procedure and the prosecuting judge needs to request additional information where such a request could have been avoided. That clarifies why so much emphasis is placed on the importance of elaborating a criminal records exchange mechanism that can support double criminality verification, on the weaknesses of the new ECRIS system that was above all introduced with a view to facilitating the appreciation of foreign convictions and why the strengths of EULOCS were highlighted in that respect.

A well thought-through EU prior conviction policy takes account of the position offences assume in the national criminal justice systems and complements the obligations it imposed with the necessary flanking measures to *in casu* ensure the availability of sufficiently detailed criminal records information. The obligation to take account of foreign convictions in a new criminal procedure and attach effects to those convictions that are equivalent to the effects that would be attached to national convictions requires a revision of the criminal records policy using a more broad perspective. The development of an information exchange mechanism making use of the knowledge on the commonalities in criminalisation between the national codes of the member states, presupposes that for each prior conviction it is known whether or not the behaviour falls within the scope of the approximation acquis as presented in EULOCS. In practice a convicting authority could be asked to add a EULOCS category to the qualification of the facts and in doing so clarify whether or not

[128] As opposed to *may* lead in which situation the convicting judge can easily give up on the foreign conviction and decide not to attach any effect to it after all.

the behaviour relates to the approximation acquis. However, the concern with respect to the current implementation strategies, as elaborated on when discussing the (in)ability of member states to produce comparable statistical data with respect to the *jointly identified parts* of offences resurfaces here. If member states – when implementing the minimum rules with respect to the constituent elements of an offence – decide to introduce a more strict regime and criminalise acts even if one of the minimum constituent elements is not present (cfr. the absence of the use of coercion, force or threat with respect to trafficking in human beings in the Belgian criminal code elaborated on above), the convicting authority will not need to elaborate on that constituent element as a result of which it will be impossible to establish whether or not is was present and thus whether or not the conviction relates to the *jointly identified* part of the offence. A member state that has included the use of coercion, force or threat into its constituent elements of trafficking in human beings will never be able to establish whether a Belgian conviction meets the double criminality requirement. This means that – in the event the prior conviction provisions stipulate that foreign convictions can only be taken into account to the extent the double criminality requirement is met – Belgian trafficking conviction can never be used as a basis to apply the prior conviction provisions. Though in criminal law, the principle that the slightest doubt should be interpreted in favour of the person involved and the example with Belgian trafficking conviction must lead to disregarding that prior conviction, the question arises whether this situation is acceptable.

Here too the question arises whether the extent to which member states are free to choose an implementation strategy should be revisited. Once more the question arises whether member states could be obliged to implement the approximation instruments in a way that allows them to always differentiate between a conviction that relates to the *jointly identified part* of an offence and a conviction that relates to the offence as criminalised in a more extended form in that specific member state.

8.3 In the course of a public procurement procedure

Secondly, the importance of a clear distinction between convictions that relate to *jointly identified parts* of offences and convictions that relate to *other parts* of offences becomes even more apparent in the case study on the offence-related exclusion grounds found in the provisions governing public procurement procedures. The national provisions governing the award of public contracts all stipulate that candidates convicted for either of the specifically listed offences

are no longer eligible to participate in a public procurement procedure.[129] The commonalities found in those provisions are the result of the 2004 Procurement Directive which has introduced a set of mandatory offence-related exclusion grounds.[130] Here too, member states are allowed to introduce a more strict regime at national level, as long as they have regard for Community law and the principles included in the Directive.

In contrast to the freedom member states have to decide whether or not to also take account of a foreign conviction that does not meet the double criminality requirement *in the course of a new criminal procedure*, no such freedom exists *in the course of a public procurement procedure*, due to the requirement to have regard for Community law and the principles included in the Directive. What is more, not only are member states not allowed to take account of a foreign conviction that does not pass the double criminality test, more generally they are not allowed to take account of *any conviction* – foreign or national – that does not pass the double criminality test using the largest common denominator in criminalization between the relevant criminal codes as a basis for evaluation.[131] This complexity is the result of the equal treatment principle that governs the functioning of the internal market and in doing so also governs the functioning of public procurement procedures.[132]

The equal treatment principle requires that the contracting authority treats all competing candidates equally by ensuring that equal behaviour has equal consequences. This means that their convictions can only be taken into account to the extent it can be established that the same behaviour when presented by the co-competitors would also have been considered criminal in the jurisdictions they operate in and may be expected to equally result in a conviction. A such assessment requires that the criminal law applicable to the acts of all competing candidates is compared and the largest common denominator of criminalizations identified. Ultimately the equal treatment principle requires that only convictions are taken into account for which the underlying behaviour

[129] See more elaborately: "Rethinking public procurement exclusions in the EU" in Vermeulen, G., De Bondt, W., Ryckman, C., & Peršak, N. (2012). The disqualification triad. Approximating legislation. Executing requests. Ensuring equivalence. Antwerp-Apeldoorn-Portland: Maklu.

[130] Art. 45 Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. OJ L 134 of 30.4.2004.

[131] Exceptions are possible by seeking recourse to the need to safeguard public order. This exception is elaborated on in "Rethinking public procurement exclusions in the EU" in Vermeulen, G., De Bondt, W., Ryckman, C., & Peršak, N. (2012). The disqualification triad. Approximating legislation. Executing requests. Ensuring equivalence. Antwerp-Apeldoorn-Portland: Maklu.

[132] The importance of the equal treatment principle in public procurement procedures is emphasized through incorportation of the principle in Art. 2 Directive 2004/18/EC.

relates to the largest common denominator in criminalizations in the participating member states.[133] Therefore it is not only possible that a foreign prior conviction fails the double criminality test and must be disregarded, it is also possible that a national prior conviction fails the double criminality requirement and must be disregarded.[134] This situation further clarifies why it is required to include sufficiently detailed information on the underlying behaviour in the criminal records information and include also whether or not the conviction relates to behaviour that is known to be criminalised throughout the EU as part of the approximation acquis. With respect to convictions for which the underlying behaviour falls within the approximation acquis it is a given that they may be used as a basis to exclude candidates participating in a public procurement procedure. With respect to any other conviction, the uncertainty of it either or not passing the double criminality test must be lifted through an assessment of the underlying behaviour.

Furthermore, it must be added, that the 'uncertainty' escape in favour of the person involved as mentioned with respect to the taking account of prior convictions in the course of a new criminal procedure cannot be used in the context of the taking account of prior convictions in the course of a public procurement procedure. As a general rule of (criminal) law, the slightest bit of doubt should be interpreted in favour of the person involved. This means that if criminal records information is not sufficiently detailed to establish whether or not the double criminality requirement is met, the foreign conviction will not be used to apply the prior conviction provisions in the course of a new criminal procedure. In the event double criminality should be met without it being possible to establish, the person involved can benefit from the diversity between the criminal justice systems in the member states. That 'uncertainty' exception can however not be introduced in a public procurement procedure. The situation may occur in which a conviction of a person cannot be characterised as either or not falling within the scope of the largest common denominator of relevant criminalizations because the criminal record information is not sufficiently detailed or because the national criminalisation provision does not include one of the constituent elements necessary to differentiate between a jointly identified form of the offence and a mere national form of the offence. As a result thereof the convictions will be disregarded and will not be used as a basis for excluding

[133] There are two approaches possible to determine the relevant member states. Either the largest common denominator is identified using the criminal codes of the 27 member states as a basis, or the largest common denominator is identified using only the criminal codes of the member states represented in the specific procurement procedure into account.

[134] Exceptions are elaborated on in "Rethinking public procurement exclusions in the EU" in Vermeulen, G., De Bondt, W., Ryckman, C., & Peršak, N. (2012). The disqualification triad. Approximating legislation. Executing requests. Ensuring equivalence. Antwerp-Apeldoorn-Portland: Maklu.

the candidate. This can jeopardise the equal treatment between that convicted candidate and a competitor who has been convicted for the exact same behaviour that is – based on the specific criminal records information complementing that conviction – identifiable as falling within the scope of the largest common denominator and thus giving rise to an exclusion. The difficulties in the identification of convictions that either or not relate to the largest common denominator of criminalizations should be read together with the strict requirements of equal treatment as a result of which the largest common denominator of criminalizations that may lead to exclusion should be further limited in light of the ability of member states to differentiate their national convictions as either or not falling within that scope. Especially here, the question arises whether the implementation freedom the member states have weighs up to this far reaching consequence.

8.4 Policy needs and feasibility

As the EU has insisted that foreign convictions be taken into account when applying prior conviction provisions and the application of those prior conviction provisions is clearly dependent on the offence involved, an EU policy needs to be developed as a complement to the prior conviction commitments.

The EU policy ought to ensure that sufficiently detailed information is available for any prior conviction that needs to be taken into account. It also ought to look into ways of finding the right balance between the equal treatment principle that ensures the proper functioning of the internal market and the desire to exclude candidates for having been convicted for any of the identified offences; the right balance also between allowing member states to choose an implementation strategy and obliging member states to implement in a way that ensures that it is always possible to differentiate between an offence that does or does not fall within the scope of the *jointly identified part* of an offence. Furthermore, even where the distinction *can* be made, it is important to ensure that the information on the behaviour underlying the prior conviction is sufficiently detailed to *establish* whether or not the conviction relates to the largest common denominator in criminalizations in a later phase. Finally, should member states want to increase the scope of offences for which convictions are safe to use as a ground for exclusion in light of the strict equal treatment principle, here too it could be considered to use the possibility to also delineate what is known to be commonly criminalised in the member states as opposed to reserving common criminalisation only for the creation of new offences.

9 The only condition: An EU offence policy

Today, there is no EU offence policy. The closest to such an EU offence policy is the current approximation policy, which cannot suffice. Not only does it look at approximation from a too narrow perspective (because there is more to approximation than framework decisions and post-Lisbon directives), it also barely thought about the actual use of the approximation acquis and where it did so, the ideas are underdeveloped (there is more to it than avoiding loopholes) and more importantly not applied in practice.

The analysis underlying this doctoral thesis has revealed that there is a need for an EU offence policy that uses the knowledge on what is common in terms of criminalisation in the member states to avoid deadlocks due to criminalisation diversity. In addition thereto, it must not be forgotten that there is a lot more commonly criminalised than reflected in the approximation acquis, even when the widest possible interpretation is used. Approximation is a technique that fills in the gaps to strengthen the fight against crime. It is not used when there are no gaps to begin with. It cannot provide insight in the common offences that have historically developed.

The centre piece of an EU offence policy is the common criminalisation acquis, in which it is mapped and visualised what is commonly criminalised throughout the EU member states, possibly even beyond the approximation acquis. Subsequently, the EU offence policy ensures that the common criminalisation acquis is deployed where useful or even necessary. To the extent that it is considered useful or necessary to expand the common criminalisation acquis, either existing common criminalisation can be identified or new common criminalisation can be acquired via approximation. In light thereof the flexibility regulation that exists with respect to the United Kingdom, Ireland and Denmark will significantly complicate the correct appreciation of the acquis.[135] As a result, it will need to be to clearly visualised that Denmark is excluded and whether or not the United Kingdom and Ireland are included. Keeping track of the approximation acquis will only become more difficult for the future which adds to the need to establish and maintain a EULOCS that clusters all existing knowledge on the criminalisation commonalities between the member states.

For both techniques (identification or approximation) it is important not to limit the effort to the mere delineation of what is common. A parallel debate on

[135] The Danish Protocol foresees that Denmark will not participate in the future approximation instruments. The Protocol on the United Kingdom and Ireland stipulates that those member states will decide individually, for each of the new approximation instruments, whether they will participate or not. So far the United Kingdom and Ireland have participated in both post-Lisbon approximating directives.

the employability of the new addition to the acquis will ensure its added value. To ensure the feasibility to use the common criminalisation acquis, the offence involved must be described in a sufficiently detailed manner. In the past, the description of approximation obligations has been justly criticized.[136] Reference can be made to the definition of the offences in relation to attacks against information systems to support that comment.[137] With respect to illegal access to information systems, Art. 2.1. of the framework decision stipulates that member states must criminalise "at least for cases which are not minor". Such a criminalisation obligation at least requires that it is clarified what makes a case minor.[138] Additionally, to ensure the feasibility to use the common criminalisation acquis, the implementation strategy could be subject to debate. Ensuring the feasibility to use the common criminalisation acquis could have significant implications on the freedom member states have when deciding on the way to implement the approximation instrument. Approximation instruments that relate to serious offences with a cross-border dimension for which a series of EU level instruments are adopted to support the fight against those offences, member states could be required to ensure that implementation is done in a way that ensures identification of cases related to those forms of crime. It means that statistical data reflecting only the *jointly identified part* of the offence must be able to be produced. Even though approximation does not interfere with the possibility of the member states to pursue a more strict criminalisation policy and criminalise even beyond the minimum requirements included in the approximation instrument, member states could be required to ensure that differentiation between cases is always possible.

It is all a matter of accepting diversities, appreciating commonalities and aligning policies accordingly.

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[136] See e.g. with respect to the definition of terrorism and racism & xenophobia: Alegre, S. (2003). Criminal Law and Fundamental Rights in the European Union: Moving towards Closer Cooperation. European Human Rights Law Review, 3, 326.

[137] Framework decision of 21 February 2005 on attacks against information system. OJ L 69 of 16.3.2005.

[138] See also: Klip, A. (2006). European integration and harmonisation and criminal law. In D. M. Curtin, J. M. Smits, A. Klip, & J. A. McCahery (Eds.), European Integration and Law. Antwerp - Oxford: Intersentia, 130.

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Part 2 – Publications

Evidence based EU criminal policy making: In search of valid data

Submitted to European Journal on Criminal Policy and Research
Submitted on 20 March 2012
Accepted for review on 30 March 2012

Abstract

EU criminal policy making is a relatively new policy domain and its credibility is said to be undermined by the lack of an evidence base. Because the EU claims to pursue evidence based policy making, this justifies reviewing the mechanisms put in place to that end. To properly evaluate the evidence base in EU criminal policy making, an assessment is made of the availability of comparable crime statistics. Crime statistics, a vital data source for criminal policy making, are considered highly problematic at EU level due to (amongst other reasons) the differences in the definition of the offences. In spite of the good intentions that can be read into the repeated acknowledgement of the importance of crime statistics and the efforts to commonly define EU worthy offences, a thorough empirical analysis leads to the conclusion that we are still in search of valid EU level data with respect to the EU level offences. The EU as a policy maker does not take its responsibility to ensure the availability of the necessary comparable crime statistical data serious enough.

Keywords: evidence based policy making; EU; criminal policy; crime statistics; approximation

Evidence based EU criminal policy making: In search of valid data

1 Introduction

This paper seeks to evaluate the evidence base in EU criminal policy making. To that end, the authors assess whether – if any – the EU's policy to ensure the availability of comparable crime statistics is sufficiently developed to support a credible and convincing evidence based EU criminal policy. To date, a such policy evaluation reviewing the availability of crime statistics from the perspective of the EU's own responsibility in light of its policy making, has not been conducted. The following paragraphs aim at contextualising this research question and introducing the research design and methodology set up to formulate an empirically sound answer to that question.

For policy decisions to produce better outcomes, they should be based on systematically gathered and analysed evidence (Sutcliffe and Court 2005). By putting the best available evidence at the heart of policy development, *evidence based policy making* is an approach that helps policy makers to take well informed decisions (Lee 2004; Davies et al. 2000; Welsh and Farrington 2007). The impact of evidence on policy making is dependent on the political climate and the level of democratization in society. The more policy makers will have to account for their decisions, the more important evidence based policies will become (Parsons 2002; Marston and Watts 2003; Campell 2001; Carr-Hill 1979).

The kind of evidence needed depends on the specificity of the policy domain involved. Despite the fact that there seems to be a continued perception that only results from hard 'exact' sciences can be used to help policy makers (Young et al. 2002), undeniably, output from criminological research is useful – even indispensable – input for policies related to crime prevention and reduction (Knepper 2007; Vito et al. 2006). Unfortunately, it is sometimes reported that criminological research (including statistical analyses) is largely ignored, under-valued and underfunded (Hope 2005; Pfeiffer et al. 1996). Too many criminal justice systems and policies have been developed without a clear policy plan (Lewis 2012), detached from available evidence. Furthermore, the claim that *criminal* policy making is surrounded by emotions, values, make-belief and even plain self interest (van Duyne and Vander Beken 2009) makes the evaluation of the evidence base therein more than interesting. It is precisely that tendency of emotions running high which makes evidence based *criminal* policy making so important. It is the only means to ensure well-balanced, effective and credible criminal policy.

To that end, it is important to elaborate on what the 'output from criminological research' can be. Though far from the only output, ever since the eighteenth century, it became clear that crime statistics are a vital source of information in the challenge to understand and fight crime (Stamatel 2009). Crime statistics help governments identify where they need to concentrate their focus (Lewis 2012). An often cited major governmental failure is not generating the data needed to properly evaluate policy programmes and initiatives. Undeniably, good data is a pre-requisite (Banks 2009). Without data, evidence based policy making is an illusion and remains "a mere rhetorical devise" (Lee 2004).

When it comes to the development of criminal policies, there are many players in the field. The EU is a relatively new player in criminal policy making and therefore also in working with crime statistics to support that policy making. The EU had come into being as an economic and political cooperation having its origin in the European Coal and Steel Community and the European Economic Community. Criminal policy making did not belong to its original portfolio. It was not until the cautious introduction of criminal policy elements into the competence sphere of the EU with the Maastricht Treaty in 1992, the EU's interest into crime statistics started to develop. Because since then EU criminal policy making has become more elaborate and more prominent, the requirements of evidence based policy making and the importance of using crime statistical data in support thereof applies *mutatis mutandis* also to the EU as a policy maker. Therefore, just like any other policy maker, the EU carries the responsibility to ensure the availability of the data it needs. It is more than justified for example to recommend that the development of new directives is supported by a statistical evidence base (Lewis et al. 2004). Even though that recommendation is sporadically made in literature, the availability of data is never reviewed from that perspective. Therefore, the differences of this contribution when compared to the contributions in the special issue on European statistics, is the perspective it uses. It does not start from a comparative criminological perspective interpreting available data to the best of abilities, but alternatively uses the responsibility of the EU policy maker to ensure the availability of proper data as a baseline to criticise the comparability problems with the current data. A policy should (have) be(en) developed to ensure the availability of proper data that needs no comparability caveats. Such data should be available to the extent necessary to support its policy making. Because the EU is not competent to deal with just any offence and therefore has no interest in just any offence, an analysis on the availability of adequate data to support EU policy making should first look into identifying the EU's priority offences. Thereafter, data availability can be reviewed.

There is one fundamental difference between the EU as a criminal policy maker and the individual member states as criminal policy makers. Citizens do not report crime to the EU; the EU does not carry out criminal investigations; the EU does not impose nor execute sentences; the EU does not manage its own criminal data system; The EU as a criminal policy maker is dependent on the data provided by the member states, who all have their individual criminal code, an individual criminal justice system and an individual data system. Therefore, it is important that the EU clearly instructs the member states with respect to the data it needs.

It is widely recognised that collecting comparable statistics is almost an impossible task (Collmann 1973; Kommer 1995; Gratia 1995; Farrington et al. 2004; Vettori 2006; Robert 2009; Savona et al. 2005). The EU soon realised this. The collection of the comparable statistics on cross-border crime have obtained an entry into the treaties with the introduction of Art. K.2.2.d. in the 1997 Amsterdam Treaty (later renamed Art. 30 TEU). That article stipulates that "*the Council shall establish a research, documentation and statistical network on cross-border crime*." In the following years, the topic gained attention and was recalled in a series of policy documents. The 1998 Vienna Action Plan enlists the improvement of statistics on cross border crime as an important goal (Council of the European Union and European Commission 1999). In the 2000 Millennium Strategy, the member states recommended the elaboration of crime statistics and called upon the Commission to launch studies in this area (European Council 2000). Subsequently, the 2003 Dublin Declaration again pointed to the need for a common language on European crime statistics (Council of the European Union 2003). Similarly, in the 2004 The Hague Programme (European Council 2004) it was noted that "*the European Council welcomes the initiative of the Commission to establish European instruments for collecting, analysing and comparing information on crime and victimisation and their respective trends in Member States, using national statistics and other sources of information as agreed indicators*". The 2006 Commission Communication on the EU Action Plan to measure crime and criminal justice reiterated the ideas in the above mentioned instruments, set up an expert group on the policy needs for data on crime and criminal justice and stressed that underpinning these objectives were tasks related to the establishment of an EU-level Offence Classification System (European Commission 2006a). The adoption of this last action plan and the evolution towards extending the scope of crime statistics collection initiatives resulted in the request for a comprehensive study on crime statistics (European Commission 2007). Despite the absence of a clear stance with respect to the need to further develop the availability of crime statistics in light of the credibility of its own policy making, the recognition of the importance of EU level crime statistics has continued also after the delivery of the study in 2009. With a view to rendering crime prevention strategies more effective, the Council has

reaffirmed once more the importance of collection, analysis and dissemination of knowledge on crime, including organised crime (including statistics) in the Stockholm programme. It is stated that "*adequate, reliable and comparable statistics are a necessary prerequisite for evidence-based decisions on the need for action, on the implementation of decisions and on the effectiveness of action"* (European Council 2010).

One of the biggest problems in the area of comparative criminology with respect to attaining adequate, reliable and comparative crime statistics remains the incompatibility of national offence definitions (Jehle 2012). To tackle that obstacle comparative criminologists have a tradition of working with standard definitions to *foster* comparability, with the caveat that those definitions cannot *guarantee* comparability (Harrendorf 2012). This problem encountered by comparative criminologists who have no means to influence their data providers, and the caveat placed with respect to the comparability of the different datasets, is something that cannot be accepted when reviewing the availability of data from the perspective of the responsibility of the EU as a policy maker. The EU must ensure the availability of the data that is needed to support its own policy making. It is responsible to ensure the comparability of the dataset it works with. If member states unanimously agree that the EU should take the lead in developing a criminal policy with respect to a certain offence type, and come up with a definition of that offence type that decision is far from non-committal and deviation from that definition when requested to provide the matching data should not be accepted.

Therefore, the analysis underlying this paper has followed a three-step approach. First, it has identified the EUs priority offences for which a comprehensive and comparable statistical dataset is indispensable. Second, it has reviewed the current data collection initiatives to assess to what extent the EU can directly make use of the data that is currently being gathered. Third, to the extent that no data set is available for all identified priority offences, existing empirical research on the level of detail available in the national data sets is reviewed to assess to what extent the EU can easily start up a complementing data collection initiative. In the event the analysis would reveal that the current level of detail is inadequate to satisfy the EU's need for statistical data, there is a pressing need for the EU to develop a comprehensive policy plan on the availability of statistical data to support its criminal policy making. This three-step approach will allow to formulate an answer to the central research question as to what extent the credibility of the EU criminal policy making is undermined by a lacking policy on the availability of data to guarantee an evidence base.

2 EU priority offences

To be able to assess to what extent adequate data is available to support the EUs criminal policy making, it is important to first identify the priority offences. The EU does not need comparable data on just any offence. It needs data with respect to the offences for which it is developing an EU policy. There is no document that authoritatively lists the EU priority offences. Many offence labels appear both in legal and policy documents, without clarifying their status within EU policy making. To delineate the scope of the analysis, a set of 10 priority offences was selected. To that end, a retrospective discourse analysis was performed to map the relative importance of the individual offence types.

Discourse analyses have become increasingly popular across a wide variety of disciplines in recent years (Hammersley 1997, 2003; Gee 2011). It covers a multitude of different approaches that vary significantly in the techniques they use. To date, there is no common understanding of how a discourse analysis should be conducted (Gee 2011; Georgakopoulou and Goutsos 1997), which makes discourse analysts vulnerable to criticism, but also allows them to be creative and design a tailor made template adapted to the specificity of the selected discourse. To accommodate possible criticism it is advised to use multiple techniques and scoring templates to test the comparability of the results and increase the validity of the discourse analysis.

More fundamentally, there is no common understanding of what constitutes a discourse to begin with. In contrast to other language analysing disciplines, discourse analysis does not privilege a certain type of texts and deals with texts as heterogeneous as literal and legal texts, interviews, news paper articles and even advertisements. The discourse selected for this analysis consists of both legal and policy documents, both binding and non-binding texts, both offence specific and general texts. The diversity therein is not considered a problem as long as that diversity is duly taken into account in the analysis.

2.1 Constructing the discourse

The exact content of the discourse to be analysed to identify the top 10 priority offences for which comparable crime statistics are indispensable to support proper policy making, was decided along three considerations.

First, primary EU legislation was taken into account. The EU's treaties are its supreme sources of law which prevail over any other sources of law and contain the legal framework in which the EU operates. Considering that criminal policy was entered into the EU's mandate with the inclusion of police and judicial cooperation as a field of interest in the Maastricht Treaty, that treaty, together

with the following Amsterdam Treaty, Nice Treaty and Lisbon Treaty are identified as part of the discourse.

Second, secondary EU legislation was taken into account. The body of secondary legislation consists of countless legal instruments based on the treaties in pursuit of the objectives set out therein. To support a justifiable selection of the vast amount of instruments therein, the so-called JHA acquis (short for Justice and Home Affairs acquis) was used as a starting point. That JHA acquis is a list compiling 528 legal instruments relevant for European criminal policy making. It is updated annually under the auspice of the European Commission and can be consulted online. It is considered to be a good starting point when constructing the discourse compilation because the JHA acquis is used as a basis to assess new member states in the context of the enlargement of the European Union. The obligation or recommendation to comply with the instruments included in the JHA acquis is considered to be of high symbolic value not to be misunderstood when assessing the importance of the texts included and the importance of the development of a policy with respect to the offences mentioned therein. It is considered to be the core of EU criminal policy making.

Third, it should be noted that the last integrated version of the JHA acquis available dates from October 2009. Unfortunately the document has not been updated since the directorate general on justice, freedom and security split into two separate directorate generals, one on justice and one on home affairs. Therefore, the dated JHA acquis was updated using January 2012 as a cut-off date. In doing so, another 37 instruments were added to the discourse, bringing the total up to 569 instruments.

It should be noted that the use of the updated JHA acquis also entails that only final documents (or the latest draft versions) were taken into account. Inclusion of different draft versions would not necessarily reflect the importance and prioritisation of an offence type for it is very much possible that a set of 10 draft documents points to lengthy discussions in the margin of a policy area whereas the existence of only 1 draft document that was immediately adopted may point to a high priority content. Additionally, looking into the number of preparatory documents that have been produced and the number of times a policy initiative was scheduled to be dealt with at a Council meeting runs the risk of assessing the importance of offence specific policy making in light of other topics of criminal policy making, which would distort the evaluation. After all, it is intended to map the importance of offence labels in light of policy making with respect to other offence labels and not with respect to any other form of criminal policy making.

(Re)constructing the discourse is only the first step. To correctly interpret and appreciate the relative importance of the use of the offence labels in that discourse, it is important to not only understand the meaning of the labels but also design a comprehensive scoring template reflecting the value of the elements in the discourse.

2.2 Understanding the meaning of the offence labels

Properly conducting the discourse analysis, presupposes knowledge on the offence labels that are included therein. This is far from self-evident considering the absence of a list of offences that are considered within the scope of the EU's competence and further complications caused by the inconsistent use of terminology when it comes to elaborating on offences. Prior research on this issue led to the identification of a set of 63 offence labels that appear in European criminal policy documents (De Bondt and Vermeulen 2009). To complement that identification exercise, three phenomena were studied more in-depth to be able to interpret the corresponding offence labels correctly, i.e. organised crime, cybercrime and sexual exploitation of children and child pornography.

First, it is clear that organised crime for long has been a hot item, the concept remains controversial. A wide variety of meanings have been attributed to it (Paoli and Fijnaut 2004; Vermeulen et al. 2010). Defining organised crime is controversial because of the substantive impact it has on the way laws are framed, how mutual legal assistance is or is not rendered, what counter measures can be deployed, how resources are allocated (Alach 2011; Finckenauer 2005). The tremendous increase in academic work over the past 40 years has made us learn more about organised crime but has also shattered what was once a simple and commonly accepted definition (Alach 2011; Zoutendijk 2010; Symeanidou-Kastanidou 2008; Fichera 2011). Much can be brought back to the dual interpretation of the concept. On the one hand, organised crime can refer to the characteristics of the act and thus refer to a crime that was duly prepared and organised. On the other hand, organised crime can also refer to the typology of the perpetrators and thus mean that the crimes were committed by an organised group (Finckenauer 2005; Von Lampe 2008; Symeanidou-Kastanidou 2008). In this latter interpretation of the concept, it constitutes an offence in itself in so far as participation to a criminal organisation is criminalised, whereas in the former the organised aspect refers merely to a *modus operandi* that can be linked to virtually any offence type. Because this paper and the assessment looks into the availability of offence based crime statistics, the decision was taken to limit the scope of organised crime to the corresponding offence type, being participation in a criminal organisation. Not only should this approach get preference looking at the discourse analysis objective to single out the 10 most prioritised offence types (as opposed to the 10

most prioritised modus operandi), this decision can also be justified looking into the EU's attempt to define organised crime ranging from the adoption of the Enfopol 35 (Council of the European Union 1997a) over the joint action (Council of the European Union 1998) to the current framework decision on organised crime (Council of the European Union 2008), which all relate to participation in a criminal organisation as a separate offence. This decision significantly impacts on the outcome of the discourse analysis because only references to participation in a criminal organisation as a separate offence where taken into account in the prioritisation assessment as opposed to including the wider concept of organised crime which covers both participation in a criminal organisation as well as offences that are committed duly prepared and organised.

Second, cybercrime is increasingly becoming a buzz word in political discourse. The opportunities created by the technological evolution have provided several offences with a new dimension and opened a whole new range of vulnerabilities (Moitra 2005; De Hert et al. 2000; Mendez 2005). The concept of cybercrime suffers from concerns that are very similar to the concerns raised with respect to organised crime. Here too a double interpretation is possible. Not only can cybercrime refer to the modus operandi and thus the use of computer and internet to commit offences, here too a set of separate self-standing offences have been created. Whereas the Council of Europe Cybercrime convention makes a distinction between (i) offences against confidentiality, integrity and availability of computer data and systems, (ii) computer related offences such as forgery and fraud, (iii) content related offences such as child pornography and racism and xenophobia, and (iv) copy right and related offences (Council of Europe 2001, 2003), the scope at EU level is far more restricted. Because the 2005 EU framework decision only refers to attacks against information systems (Council of the European Union 2005), and in analogy to the choice made for organised crime, the concept included in the prioritisation analysis was limited in the same way. This too impacts significantly on the outcome of the discourse analysis which represents only the strict reference to the separately listed offences. Wherever reference is made to cybercrime as an overall concept, the context of that reference was analysed in order to understand whether the reference symbolised a prioritisation of attacks against information systems or a prioritisation of more content related crimes such as child pornography.

Third, sexual exploitation of children and child pornography are joint together for the priority assessment for several reasons. Firstly, a linguistic analysis of the texts does not (always) allow them to be separated. It is (often) unclear whether the two concepts should be regarded as a whole or as two different offence labels. Secondly, besides mere linguistic arguments, the decision to join them can be supported by referring to the use thereof in legal and policy document. Not only are both combined in approximation

instruments (Council of the European Union 2004), they are also used as one single concept when determining the scope of information to be transmitted in Art. 13.6 (a) (ii) of the Eurojust Decision (Council of the European Union 2002a), as well as when listing the offence labels for which double criminality may no longer be tested, for example in Art. 2.2 4th indent of the framework decision on European Arrest Warrant (Council of the European Union 2002b).

2.3 Designing a scoring template

Because there is no common understanding on how to conduct a discourse analysis, it is important to use multiple scoring strategies to test the compatibility of their outcomes and accommodate any criticism, especially because the outcome will form the basis for the evaluation of the availability of crime statistics. Therefore, three different approaches were combined.

- First, a simple counting exercise lead to the ranking of the priority offences based on the number of offence specific instruments that were adopted.
- Second, a simple counting exercise lead to the ranking of the priority offences based on the number of references to the offences in general instruments.
- Third, an intricate interpretation of the prioritisation lead to the ranking of the priority offences taking account of the characteristics of the instrument (i.e. general or offence specific, binding or non-binding) and the justification for prioritisation (i.e. whether the importance of EU level action was taken for granted or duly motivated).

This final scoring strategy needs further clarification. To properly conduct the discourse analysis, it is important to thoroughly understand the structures and processes underlying the selected texts/units (T. A. van Dijk 1998) to correctly appreciate and score them.

First, an in-depth assessment of the prioritisation of an offence in light of the instrument the policy discourse is included in, is everything but straight-forward.

Firstly, a purely legal assessment of the classification and ranking of legal and policy documents in which a treaty would automatically be considered more important than a non-binding policy document is not a satisfactory basis for the analysis. It is important to stress the relativity of the importance of treaty texts in European criminal policy making, both in general as well as in respect to the specific objectives of this analysis. On the one hand, from a more general European criminal policy perspective, it should be taken into account that the European Union often *ex post* corrects the legal basis provided in the treaties, according to the instruments adopted. Analysis reveals that the thematic scope of the instruments adopted after the coming into force of the Amsterdam Treaty

exceeded the listed offences and still exceed the offences currently listed in the Lisbon Treaty even though the offence list has been updated (De Bondt and Vermeulen 2009). On the other hand, the specific objectives of this analysis consists in assessing the credibility of (the evidence base) in currently developed EU level criminal policy initiatives, and not so much the credibility and justifiability of the intention to develop an offence specific policy which can be read into inclusion of an offence label in a general treaty. Therefore, much more importance could be read into an offence specific binding secondary instrument as opposed to a primary treaty text.

Secondly, careful consideration lead to the conclusion that no distinction should be made based on the legislative procedure regulating the adoption of texts either. Even though it is interesting to note that European criminal policy making has moved from a unanimity voting to a qualified majority voting, analysis revealed that no reliable conclusions can be drawn in terms of prioritisation of offences, using these procedural differences as a basis. After all, the fact that a member state does not agree with the adoption of an instrument related to a specific offence type, is not necessarily linked to a disagreement with respect to the prioritisation of action for the offence type. To the contrary, in the majority of cases, resistance against the adoption of a legal instrument will be based on the specific content of the proposed measures. Furthermore, reducing the importance of an offence type *pro rato* of the number of member states that did not support the adoption of a specific instrument, should also effect the prioritisation read into the existence of all other instruments and documents pro rato of the number of member states in the Union at the time of the adoption.

Thirdly, besides the binding or non-binding characteristic of a text included in the discourse, another characteristic is taken into account, namely the general or specific nature of the instrument. Prioritisation of offence types included in general instruments that refer to more than one offence type is less pronounced then the prioritisation that speaks from a specific instrument that is entirely dedicated to one single offence type.

These observations have lead to the conclusion that a justifiable distinction can be made between general and offence-specific texts, between binding and non-binding texts in terms of the relative prioritisation that arises from the offences discussed therein, but no further internal distinction is to be made within each of those categories.

Second, regardless of the characteristics of the text, an assessment is made of the way reference is made to offence labels. The objective is to not only look into normatively prioritising offences by stressing the importance of action (e.g. "It is important to take action with respect to this phenomenon."), but even more so look into the manner with which their importance is justified and clarified (e.g.

"It is important to take action with respect to this phenomenon *because* [...].)" (Hammersley 2003). Within this second level, it was deemed important to distinguish between the manner with which importance is justified and clarified in general instruments as opposed to the manner with which importance is justified and clarified in offence specific instruments. Analysis revealed that in some offence specific instrument far more in-depth attention is paid to such justification and clarification when compared to other offence specific instruments. This creates the impression that a prioritisation evaluation needs to uphold a threefold distinction between no attention, attention and significant attention. However, this would distort the image of prioritisation because there is a direct link between the level of attention in offence specific instruments and an inclusion of the offence label into the basic treaties. Seemingly, the Union uses this extended attention to counter any form of critique with respect to its competence to adopt offence-specific instruments with respect to not-listed offence types. Vice versa, the EU only waists little words justifying its actions when there is a solid treaty base for EU action with respect to a specific offence type. This means that the level of attention paid to clarifying and justifying the importance of EU action with respect to an offence type is not (only) an expression of the importance and prioritisation of the offence type but is (perhaps even more) an expression of potential competence concerns. Considering the relatively little attention that will be paid to treaty inclusion of offence types as a sign of prioritisation, it is important to neutralise this (in)direct effect of treaty inclusion. Therefore, a distinction is made in the assessment of the manner with which importance is justified and clarified in general instruments as opposed to the manner with which importance is justified and clarified in offence specific instruments. For general instruments a distinction is made between significant attention, attention and little to no attention whereas for offence specific instruments a distinction is only made between attention and no attention.

Table 1 presents the scoring strategy that was designed as the third part in the template, based on this assessment of the structures and processes underlying the texts/units selected for the discourse analysis.

TABLE 1 Scoring template third approach

Level 1 – Characteristics		**Level 2 – Justification**		
		Significant	Neutral	Little to no
General texts	Binding	4	3	2
	Non-binding	1	0,75	0,5
Offence specific texts	Binding	6		4
	Non-binding	1,5		1

2.4 Results of the analysis

Having reconstructed the discourse, designed the scoring template and gained insight into (the meaning of) the offence labels present in the European criminal policy discourse, the discourse analysis was conducted with a view to selecting the top 10 priority offences for which availability of crime statistical data will be reviewed. The outcome will be compared with the current data collection initiatives as well as with existing knowledge on additionally available comparable data. The presentation of the results takes those subsequent steps into account. Because the empirical data used to assess the additional available comparative crime statistics was gathered in 2008 in the context of a comprehensive study on crime statistics conducted for the European Commission, a dual cut-off data was taken into account. The results are presented using 31 January 2008 as an interim date corresponding to the start of the empirical data collection and 21 January 2012, as the final date, allowing to test the stability of the prioritisation over time.

Table 2 does not only show the EU's top-10 priority offences resulting from the retrospective discourse analysis, it also reflects the scope of the EU's interest in these offences via a reference to binding legal instruments. It should be kept in mind that the EU is not interested in any kind of behaviour that could fall within the scope of the listed offence labels, but is only interested in behaviour that was expressly identified to fall within that scope. The legal basis for this limitation is found in the approximation instruments in which the EU has clarified what behaviour should (at least) fall within the scope of the offence labels. Consequently, when looking into the availability of data to assess the credibility of the EU's criminal policy making, this should only be conducted for those parts of offences for which the EU has a legitimate interest. In sum, this means that the behaviour included in the EU's top-10 priority offences was limited to the behaviour explicitly prioritised through pursuing EU-wide criminalisation via the adoption of approximating instruments.

TABLE 2 The EU's top 10 priority offences

	Situation 2008				Situation 2012				Stability
	Specific instruments	General instruments	Intricate interpretation		Specific instruments	General instruments	Intricate interpretation		
	#	#	score	rank	#	#	score	rank	
Trafficking in human beings[139]	27	25	126	1	31	34	170	1	-
Illegal (im)migration[140]	33	13	124	2	35	22	151	3	▽1
Drug trafficking[141]	31	30	118	3	38	40	155	2	△1
Fraud against the financial interests of the European Communities[142]	7	22	87	4	8	28	102	5	▽1
Terrorism[143]	12	25	79	5	19	44	134	4	△1
Corruption[144]	6	18	59	6	13	26	92	6	-

[139] As defined in *(only applicable for 2012 situation):* Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children repealed and replaced by Council Framework Decision of 19 July 2002 on combating trafficking in human beings (*repealed and replaced by Directive of 15 April 2011 of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims)* all three to be read together with the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons as well as the Council of Europe Convention of 16 May 2005 on Action against Trafficking in Human Beings

[140] As defined in: Council Framework Decision of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, as complemented by the Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

[141] As defined in *(only applicable for 2012 situation):* Council Framework Decision of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking

[142] As defined in: Convention of 26 July 1995 on the protection of the European Communities' Financial Interests

[143] As defined in *(only applicable for 2012 situation):* Council Framework Decision of 13 June 2002 on combating terrorism (*as amended by Council Framework Decision of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism)*

[144] As defined in: Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of member states of the European Union

	Situation 2008				Situation 2012				Stability
	Specific instruments	General instruments	Intricate interpretation		Specific instruments	General instruments	Intricate interpretation		
	#	#	score	rank	#	#	score	rank	
Money laundering[145]	6	22	55	7	8	29	75	7	-
Participation in a criminal organisation[146]	6	16	45	8	8	24	72	8	-
Offences against information systems[147]	6	9	33	9	7	19	57	10	▽1
Sexual exploitation of children and child pornography[148]	2	10	30	10	4	19	58	9	△1

Table 2 shows that though the ranking slightly varies according to the approach used, it is fairly stable over time. Looking only into the number of instruments in the selection that specifically deals with one of the listed offences labels or looking only into the number of references to an offence label in general instruments may not accurately reflect the prioritisation for it does not differentiate between binding legal instruments and non binding policy

[145] As defined in: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime

[146] As defined in *(only applicable for 2011 situation):* Joint action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union *(repealed and replaced by the Council Framework Decision of 24 October 2008 on the fight against organised crime)* both to be read together with the 2000 UN Convention on combating transnational organised crime.

[147] As defined in: Council Framework Decision of 21 February 2005 on attacks against information systems

[148] As defined in*:* Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children repealed and replaced by the Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography, *repealed and replaced by a new Directive of 13 December 2011* (both to be read together with the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography).

recommendations or communications. The results from the intricate interpretation of the prioritisation of the offence labels in the criminal policy discourse point to a stability over time. The top five consists of the same offence labels and no offence label has moved more than one place up or down the ladder.

The prioritisation of these offences in both legal and policy documents is far from non-committal. If the EU is to develop credible policies with respect to those offences, the EU should have data on (at least the incidence of) these offences and use the results of criminological *ex ante, ad interim* and *ex post* analyses as evidence to evaluate the impact of its policies and programmes (Böhme 2001; Vermeulen and De Bondt 2009; De Bondt and Vermeulen 2010).

3 Comparison with existing data collection initiatives

Having delineated the scope of the research along the EU's top-10 priority offences, the statistical data collection by existing EU bodies and agencies was reviewed for each of the identified priority offences. It is important to underline that the following evaluation is not intended to be self-standing evaluate the collection initiatives themselves, but intent to evaluate the extent to which they suite the very specific needs of the EU criminal policy maker. As a result, the evaluation only looks into the data collection with respect to one or more of the selected priority offences and ignores any other type of collected data. This means that the eligibility of the reviewed data collection mechanisms as reported below, should be interpreted only in light of the ability to provide the data needed to provide an evidence base for EU criminal policy making.

It is only logical for this assessment to embark with the review of the three data collection initiatives that can be characterised as being landmarks in the evolution of EU level crime statistics.

First, illicit drug use and trafficking caught European attention and following the commitments made at the 1990 Dublin European Council the decision was taken to set up EMCDDA, short for the European Monitoring Centre for Drugs and Drug addiction (Council of the European Union 1993b; Dublin European Council 25 and 26 June 1990). It gathers and disseminates information e.g. on the demand for and supply of drugs, international trade, producer, consumer and transit countries and international cooperation. From an offence based crime statistical perspective, EMCDDA is a major player for the compilation of data on illicit drug trafficking. In light thereof, Art. 2.6 of its founding Regulation holds an important objective. It spells out as its objective to ensure improved

comparability, objectivity and reliability of data at European level by establishing indicators and common criteria of a non-binding nature (Council of the European Union 1993b). Mirroring the scope limitation provided for drug trafficking in our priority ranking, EMCDDA refers to the 2004 framework decision to define the behaviour that falls within the scope thereof (European Monitoring Centre for Drugs and Drug Addiction 2010). This means that the data set available at EMCDDA perfectly matches the needs of the EU criminal policy maker.

Second, racism and xenophobia caught European attention and following the commitments made at the 1994 Corfu European Council the decision was taken to set up EUMC, short for the European Monitoring Centre on Racism and Xenophobia (Corfu European Council 24 and 25 June 1994; Council of the European Union 1997b). It gathers and disseminates information on the extent and development of the phenomena and manifestations of racism, xenophobia and anti-Semitism, their causes, consequences and effects and examples of good practice. From an offence based crime statistics perspective, EUMC (later transformed into FRA, short for Fundamental Rights Agency) is a major player for the compilation of data on punishable acts related to racism and xenophobia. Here too, its founding Regulation holds in its Art. 2.2.f the objective to develop methods to improve the comparability, objectivity and reliability of data at European level by establishing indicators and criteria that will improve consistency of information (Council of the European Union 1997b). In spite of the attention racism and xenophobia receives, it did not make it to the top 10 priority offences. Though there is no reference to either the 1996 joint action nor the 2008 framework decision in the legal framework shaping this agency and its data collection mechanism (Council of the European Union 2007), the explicit references in the 8th preamble of the founding Regulation of its predecessor (Council of the European Union 1997b) and the 11th preamble of the Racial Equality Directive (Council of the European Union 2000a), combined with the assertion in the annual report that the data gathered can be directly linked to the scope of the framework decision (Fundamental Rights Agency 2010), makes it very likely that the available data matches the needs of the European criminal policy maker.

Third and final, organised crime too has always been a top priority in European criminal policy making. Already in 1993, the European Council recognised the need to issue annual strategic reports on the organised crime situation in Europe (Council of the European Union 1993a). The first edition of the European OCSR, short for Organised Crime Situation Report, was issued in 1994 (Vander Beken et al. 2004). Following the commitments made at the 1996 Dublin European Council the decision was taken to set up an High Level Group on Organised Crime, tasked with drawing up a comprehensive action plan to

further elaborate on a European organised crime policy (Dublin European Council 13 and 14 December 1996; Vander Beken et al. 2004). Similar to the articles on ensuring improved comparability, objectivity and reliability of the data gathered by establishing indicators in the founding Regulation of the above mentioned monitoring centres, emphasis is placed on the importance of a well constructed data collection mechanism. In the meantime, OCSR has been transformed into OCTA, short for Organised Crime Treat Assessment Report, in order to execute the commitments enlisted in the Hague Programme (European Council 2004). However, the current data collection with respect to organised crime is not useful for our analysis as it does not specifically look in to the prevalence of "*participation in a criminal organisation*" which is how organised crime was delineated for this assessment. Furthermore, besides the critiques with respect to the unreliability and incompleteness of data sets (Vettori 2006; van Duyne 2010; Savona et al. 2005) the existing data collection on organised crime as a phenomenon is highly criticized for being too focussed on regular situation reporting, creating little added value for risk-based evaluations an vulnerability studies (van Duyne and Vander Beken 2009).

Additionally, Eurostat is a relatively new player in this scene. In 2007 the first edition of the Crime and Criminal Justice edition of *Statistics in focus* was launched. When reviewing the data that is collected and published by Eurostat, it cannot but be concluded that there is a huge discrepancy between what is collected and what would be useful for the EU in light of the identified priority offences. Eurostat's *Statistics in Focus* reports on the following 7 offence categories: total crime, homicide, violent crime, robbery, domestic burglary, theft of a motor vehicle and drug trafficking (Tavares and Thomas 2007). Apart from the latter offence category, the data collected and presented is of little use as an evidence source for EU level criminal policy making. However, the added value of Eurostat is highly questionable looking at the track record of EMCDDA with respect to data on drug trafficking. The publication is clearly intended to support national policy making and inform national governments of their position with respect to other member states. Additionally, it is intended to direct member states towards best practices and support knowledge exchange between the member states in order to get ideas on how to best allocate resources. Most fundamentally, it should be stressed that Eurostat's data collection is not based on the offence definition that is developed at EU level and thus for which the EU has a legitimate data interest with a view to policy evaluation.

To complement the review of the data collection by EU bodies and agencies, other initiatives have been included in the assessment. Firstly, the development of a European Sourcebook on Crime and Criminal Justice Data, which sprung from a Council of Europe initiative, is undoubtedly the most significant. It has a

long standing history and the datasets it provides were the main source used in the contributions of the latest special issue on European statistics. In 1993, the Council of Europe challenged a Committee of Experts with the preparation of a feasibility study concerning the collection of crime and criminal justice data for Europe (Aebi et al. 2002; Killias et al. 2006). For methodological reasons, the sourcebook focuses mainly on traditional and high volume crime, including the total of criminal offences, intentional homicide, assault, rape, robbery, theft, theft of a vehicle, burglary, domestic burglary, drug offences and drug trafficking. In doing so, the publication links in with the data collection conducted by Eurostat. In the latest edition, efforts were made to extend the Sourcebook's coverage beyond ordinary ('street level') crimes and to include offences such as fraud, offences against computer data and systems, money laundering and corruption. Obviously an academic initiative tasked to compile – to the best of their abilities – as much comparable crime statistics as possible, is limited by the then available data. It has been repeatedly stressed that the members of the European Sourcebook Group are confronted with difficulties with respect to the comparability of data due to differences in the offence definitions, which was tackled by working with standard definitions with the caveat that those definitions *foster* but cannot *guarantee* comparability (Harrendorf 2012). Despite the fact that the members go to great lengths to understand the characteristics of the data collected for each country (Lewis 2012), such a limitation is of course not acceptable for a policy maker who is responsible to ensure the availability of the data it needs to fulfil its task as a policy maker. Data gathered for EU policy purposes should perfectly fit the EU definition without any variation.

Secondly, the use of international surveys to collect data aims at stepping away from the official data records and the difficulties that are caused by the differences in the national criminal justice and data systems (Blath 2008; Lewis 2012). Alternatively, these surveys try to overcome those differences by collecting new information, across different countries all at once, ensuring data collection in a more consistent and systematic way (Stamatel 2009; J. Van Dijk 2009). These surveys either have a particular focus (e.g. violence against women) or a more general focus (e.g. the international crime victim survey). The relevant similarity between these surveys and the European Sourcebook is the kind of offences that is focused on. Cross-border offences are left aside, because the respondent profile does not match the victim profile of those offences.

Concluding, eligibility of the current data collection initiatives is disappointing. The existing data collection mechanisms only marginally meet the needs to pursue proper *evidence based European criminal policy making*. Even though they engage in a cross-national analysis of crime statistics, the topic of the analysis remains rather national in that phenomena of cross-border crime are not included. When one or more EU priority offences are involved in the review,

the scope delineation proves to be a hurdle to use the data for evidence based European criminal policy making. The only offence label that is properly covered is drug trafficking by the EMCDDA, potentially complemented with the data gathered by the European Sourcebook Group, provided that the standard definition used matches the EU level approximated offence definition and no variations are allowed. Furthermore, the newest additions to the offences covered by the European Sourcebook Group can prove interesting for the EU as a policy maker, provided that the data provided by the member states does not deviate from the definition jointly agreed upon for EU level policy making.

However, the fact that the data collected by the current data collection initiatives does not match the needs of the European criminal policy maker does not mean that the data is not available at the level of the data providers. Because an evaluation of the need to adjust the European policy to ensure the availability of crime statistics is dependent on the *actual ability* of the data providers to come up with the required data, the evaluation needs to step beyond the content of the current data collection initiatives and needs to look into the real availability of crime statistics and the feasibility of data providers to meet the scope limitation criteria.

Therefore, a proper evaluation of the feasibility of evidence based European criminal policy making requires that all ten of the EU's priority offences were subject to a data availability assessment reviewing the ability of police authorities to provide data relevant to support evidence based European criminal policy making.

4 Comparison with knowledge on additional available data

Therefore, the third and final step in the research methodology consists of an empirical assessment of the ability of police authorities to provide the data needed to ensure a proper evidence based European criminal policy making. Even though a meaningful statistical data set combines not only data from police authorities, but includes data from different actors in the criminal justice chain and even beyond, an assessment of police data was considered to provide a good starting point and measure because police data is generally accepted as being the most detailed. If police authorities are unable to provide the data required to support evidence based European criminal policy making, *a fortiori* other authorities will not be able to provide the data either. Such an evaluation will allow to draw conclusions with respect to the need to develop or adjust availability policies corresponding to the (non)availability of statistical data in the data systems of national data providers.

Though this exercise is particularly relevant for the offence labels for which currently no eligible data collection mechanism exists, analysis was conducted for all 10 EU priority offences. In doing so, the results can shed light on the completeness and accurateness of the data in the existing data collection initiatives.

The empirical data set compiled in 2008 will be used to conduct this assessment (Mennens et al. 2009). With the mandate of the European Commission (European Commission 2007), all member states were asked to provide an integrated answer with respect to the ability of their police authorities to provide the requested data. The review was limited to their ability, thus without asking them to actually provide data. Two methodological aspects should be briefly elaborated on. First, the data gathering methodology underlying this assessment accommodates the concerns related to the differences in the definition of the behaviour that falls within the scope of the offences by working with data that is limited to those parts of offences for which double criminality and thus comparability is definite and irrefutable (De Bondt and Vermeulen 2009). In doing so, an EU standard definition is used, be it not based on the national criminal justice provisions and the architecture of the national data systems as a basis, but using the unanimously agreed EU-level offence definitions as a basis. Second, respondents were given the opportunity to differentiate between *column A* (short for "Are", meaning that the requested data is currently being produced), *column C* (short for "Could", meaning that the requested that is not currently produced because there is no need or interest for, but the level of detail in the data systems allows the data to be produced upon request) and *column N* (short for "Not possible", meaning that the level of detail in the data system does not allow the data to be produced, even when there is a specific request) (Mennens et al. 2009). It is important to underline that the presented results reflect the reported availability of statistical data and may therefore differ from the actual situation. However, the reported availability of statistical data gives valuable insight into the perceived feasibility to produce statistical data that is relevant for EU policy making and can therefore be used as a pre-impact assessment of EU intervention in this respect. To further avoid a distortion in the results due to replying in the socially desired way out of fear for a naming and shaming, it was agreed with the respondents not to link the replies to the corresponding member state.

TABLE 3 Availability of the EU's top-10 priority offences

	A		C		N	
Offences as defined at EU level:	n	%	n	%	n	%
Trafficking in human beings	16	59,26	7	25,93	4	14,81
Illegal (im)migration	18	66,67	4	14,81	5	18,52
Drug trafficking	22	81,48	3	11,11	2	7,41
Fraud against the financial interests of the European Communities	6	22,22	3	11,11	18	66,67
Terrorism	13	48,15	7	25,93	7	25,93
Corruption	20	74,07	2	7,41	5	18,52
Money laundering	18	66,67	6	22,22	3	11,11
Participation in a criminal organisation	16	59,26	5	18,52	6	22,22
Offences against information systems	15	55,56	8	29,63	4	14,81
Sexual exploitation of a child and child pornography	11	40,74	8	29,63	8	29,63

Table 3 shows that the current level of data availability in the EU is worrying and inadequate to be used as a credible evidence base for EU criminal policy making.

It is not possible for any of the EU's top 10 priority offences to produce a full EU picture. This means that currently for none of the EU's top 10 priority offences policy initiatives *can* be based (let alone *are* based) on the output from criminological research conducted on a full set of crime statistics. This is striking because it is recognised at EU level that crime statistics are a vital source in the fight against crime and thus in criminal policy making (European Council 2010). Therefore, it can only be echoed that problems of missing data (Allison 2002) are still ongoing. Furthermore, considering that all 10 of the identified priority offences are Europol and Eurojust mandated offences, not only the number of member states' police authorities that are unable to provide data is worrying. Additionally, the number of member states' police authorities that are currently not producing statistical data (but could do so), sheds an interesting light on the data that is transferred to Europol and Eurojust. After all, if that many member states' police authorities are not producing statistical data on those offences, the data set available at Europol and Eurojust may be even less complete than first anticipated. This finding corroborates with the critique that TE-SAT and OCTA reports are (partially unnecessary) based on incomplete data sets (Vettori 2006; van Duyne 2010).

Taking account of the existing data collection initiatives, it comes as no surprise that data availability for drug trafficking is the highest with 92,59%. Within the top five priority offences, the availability score for terrorism may be unexpectedly low. However, the disappointing result does corroborate with findings in literature. The vast amount of definitions for terrorism are a huge challenge for data collection (LaFree et al. 2010). Almost every data collective initiative uses its own definition (Schmid 2004), what makes data production particularly challenging for data providers. Likewise, the problematic character of the extremely low score for fraud corroborates with findings in literature (Levi and Burrows 2008). For corruption on the other hand, an offence type for which definitional issues are consistently raised (Zimring and Johnson 2005), an availability score of 81,5% is better than anticipated. Likewise, the availability of data on offences against information systems is unexpectedly high with its 85,19%, considering that the implementation deadline for the approximation obligation had not passed at the time of the availability assessment. The link between the new EU instrument and the existing Council of Europe instruments in this field come to clarify this.

Three conclusions can be drawn from the current availability of crime statistics in light of the needs for European criminal policy making. First, a lot of work remains to be done as for none of the offences a 100% availability is reached, not even for offences that have a long data collection history to rely on. Second, taking an 80% availability as a minimum benchmark for reliable policy making, only six out of the ten priority offences can be subject to evidence based policy making. Third, there is no correlation between the priority ranking at EU level and the data availability at individual member state level.

For two of the offence types, the availability results were analysed further not only in order to gain a better understanding of their meaning, but also to look into possible difficulties that need to be taken into account when designing a European data availability policy. The follow up research focussed first on the offence type with the poorest result (i.e. fraud against the financial interests of the European Communities) and second on the offence type that was ranked as the highest priority following the discourse analysis (i.e. trafficking in human beings).

First, follow up research focussed on the poorest result to understand the poor availability of data on fraud against the financial interests of the European Communities, an offence for which the "interest of the EU" is symbolically very high (Delmas-Marty 2000; Xanthaki 2006; Seibert 2008). A shocking 66,67% of the member states' police authorities are unable in whatever way to provide reliable data. With only 1/3 of the member states covered, it is absolutely impossible to draw any kind of reliable conclusion on the success of the EU's policy initiatives in the fight against this kind of fraud. Analysis revealed two alarming problems.

Firstly, as is true for all other criminalisation obligations, the obligation foreseen in the Convention of 26 July 1995 on the protection of the European Communities' Financial Interests does not require member states to introduce a separate offence. Its Art. 1.2 required member states, where necessary, to adapt their national criminal law in such a way that the conduct listed in Art. 1.1. constitutes a criminal offence. Consequently, three scenarios are plausible. Either no adaptation is required for member states with a broad notion of fraud, or the existing offence definition is amended to ensure inclusion of the listed behaviour, or a separate offence is specifically designed. The diversity between these scenarios and the limited number of member states that have introduced a separate offence explains why most national data systems are not designed in a way that allows data with respect to the specific conduct listed in Art. 1.1. to be separated for policy evaluation.

Secondly, data availability will not necessarily benefit from a recommendation to introduce a separate offence when implementing an approximation obligation; not even from the recommendation to organise the data system in a way that data can be separated from other types of fraud. Strikingly, the follow up analysis revealed that some member states even though they have such separation either in the criminal code and/or in the data system, have developed a practice that does not use the separate offence for pragmatic prosecutorial reasons. It turns out that the way the definition of "fraud against the financial interests of the European Communities" is constructed at EU level and therefore implemented at national level, places a very high evidential burden on the prosecutorial services. As a result thereof policies have emerged to choose the line of least resistance and prosecute fraud against the financial interests of the European Communities as an ordinary type of fraud. From the perspective of the obligation member states have in terms of loyalty to the EU, this is not a problem. Because Art. 325. 2 TFEU (ex. Art. 280 TEC) requires member states to see to it that fraud against the financial interests of the European Communities is prosecuted and convicted in a way that is similar to national types of fraud (Jussi 2004), the net 'punitive' effect in the long run is the same, be it attained more easily. As a result, specific data on "fraud against the financial interests of the European Communities" retrieved from the data systems will not provide correct incidence and conviction data for behaviour listed in Art. 1.1. Convention of 26 July 1995 on the protection of the European Communities' Financial Interests. Even though prosecutorial practices fall outside the scope of the EU's competence, if the practices hinder effective EU policy evaluation and such hindrance is the direct result of the construction of an EU level definition, this should be an EU concern with respect to future approximation initiatives.

Second, the assessment of data availability in the data systems of the member states' police authorities was even taken a step further for trafficking in human beings, i.e. the offence type that was indicated as the top priority. Considering the diversity and complexity of a phenomenon such as trafficking in human beings, mere incidence data is useless (Savona and Stefanizzi 2007; Laczko 2005; Aronowitz 2001; Vermeulen et al. 2006; Vermeulen and De Pauw 2004). Undeniably, to have a valuable dataset that can be used by a policy maker with a view to provide an evidence base for criminal policy making, the level of detail should be significantly increased, to include at least information on the subject and purpose of trafficking.

Firstly, with respect to the subject of trafficking, a distinction should be made between adults and children. This distinction is prompted by the European tradition to fight against crimes against children, which can only lead to the conclusion that separate data on trafficking of children is indispensible. The 23rd Tampere Presidency conclusion placed special emphasis on the problems of children in relation to crime (Tampere European Council 15-16 October 1999), which was recalled in the 2000 Millennium Strategy (European Council 2000). The Hague Programme listed the specific focus for trafficking of children as the 4th priority in the strategic objectives for 2005-2009 (European Council 2004). Currently the promotion and protection of the rights of the child are included in Art 3.3. §2 and Art 3.5. TEU as official objectives of the Union. Furthermore, the fight against trafficking of children is explicitly mentioned in Art. 79.2.(d) in the context of the Union's migration policy. Additionally, the higher vulnerability of children is also consistently stressed in the offence specific instruments, such as the framework decision on trafficking in human beings (Council of the European Union 2002c), but also the Council of Europe and United Nations instruments (Council of Europe 2005; United Nations 1949, 2000, 1989). Finally, specific funding programmes have been launched focussing specifically on the vulnerability of children (e.g. Daphne Programme). Consequently, the need for separate data on offences against children is more than apparent.

Secondly, with respect to the purpose of trafficking a distinction should be made between the different purposes with which trafficking in human beings is pursued. In legal instruments a distinction is made between the purpose of labour or service exploitation, the purpose of sexual exploitation and the purpose of organ or human tissue removal (the latter is included only in Art. 3(1) I (b) of the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography). Additionally, specifically with respect to trafficking of children, that UN Optional Protocol also refers to the purpose of recruiting child soldiers (in its Art. 4) and the purpose of illegal adoption (in its Art. 3(1) a (ii)). Because a strong and effective policy to tackle these different forms of trafficking in human beings

should duly take account of the different purposes for which trafficking is pursued, separate incidence data is indispensible.

When looking at the availability of data at this level of detail as presented in table 4, the situation becomes even more worrying. If no reliable EU level differentiation can be made between trafficking of an adult as opposed to trafficking of a child, nor a differentiation along the purpose of trafficking, clearly no specific targeted policy initiatives can be developed.

TABLE 4 Availability of purpose data with respect to the EU's top priority offence

	A		C		N	
	n	%	n	%	n	%
TRAFFICKING IN HUMAN BEINGS	16	59,26	7	25,93	4	14,81
TRAFFICKING OF AN ADULT	5	18,52	8	29,63	14	51,85
For the purposes of labour or services exploitation	5	18,52	5	18,52	17	62,96
For the purposes of sexual exploitation	8	29,63	4	14,81	15	55,56
For the purposes of organ or human tissue removal	5	18,52	4	14,81	18	66,67
TRAFFICKING OF A CHILD	6	22,22	9	33,33	12	44,44
For the purposes of labour or services exploitation of a child	6	22,22	5	18,52	16	59,26
For the purposes of sexual exploitation	6	22,22	6	22,22	15	55,56
For the purposes of organ or human tissue removal of a child	4	14,81	5	18,52	18	66,67
For the purpose of recruiting child soldiers	1	3,70	1	3,70	25	92,59
For the purpose of illegal adoption	6	22,22	4	14,81	17	62,96

In order to conduct truly meaningful cross-border phenomenological research into the complexity of trafficking in human beings, and provide a solid and empirically sound evidence base for policy making, data needs to be refined even further (Fehér 2004). From that perspective, a combination with variables such as the country of origin and/or destination is still quite basic. In-depth phenomenological research will even go beyond these basic variables and attempt to also look into the context in which offences are committed. To be able to set up an integrated action plan in the fight against trafficking in human beings, data is needed on the other offences that are committed in the context of trafficking in human beings and that are irrefutably crucial for the success of

trafficking in human beings. Reference can be made to the falsifications of passports or travel documents that are committed 'in the context of' trafficking in human beings (Vermeulen and De Bondt 2009; Council of the European Union 2000b). It goes without saying that an integrated comprehensive action plan to fight trafficking in human beings also needs to look into ways to tackle these so-called context offences. A such approach obviously requires a data set of which today the level of detail is unattainable, even for one of the EU's most researched phenomena and top priority offence

5 Conclusion

It is clear that there will be no data without a policy to ensure data availability. The above analysis clearly revealed that in absence of an explicit policy to ensure the availability of high quality crime statistical data, relevant data availability is poor. The assertion that it is an important shortcoming of most governments not to ensure the availability of the data necessary to evaluate their policies also applies to the EU. Because crime statistic are accepted as an important (though not the only) source with a view to producing an evidence base for sound criminal policy making, this is an important gap in the EU's policy. Undoubtedly, the current gap undermines the credibility of EU level evidence based criminal policy making. It is most regrettable, that at the time of the development of European criminal cooperation initiatives and at the onset of the creation of an EU criminal policy, so little attention was paid to the difficulties that are inextricably bound up with the availability of evidence to support and evaluate those policy initiatives. Especially in light of the parallel evolution promoting evidence based policy making at EU level with a view to increasing legitimacy, acceptability and credibility of EU policy making, this is most unfortunate.

Therefore it must be recommended that data availability policies are developed on two levels. First, the EU policy maker must demand availability of incidence data, at least for the EU's top-10 priority offences to have a minimal evidence base for future policy making. Second, the EU policy maker must further support (research) initiatives that aim to increase the availability of more detailed data to feed phenomenological studies and have a more extended evidence base for future policy making.

5.1 Ensuring the availability of incidence data

First, as a baseline, the EU is entitled to have access to incidence data for its top-10 priority offences. In spite of the justified claim, the EU is somewhat reserved and hesitant and questions its mandate to interfere with the national data systems. There is no need for such reservation or hesitation. The minute it is felt that individual member state efforts are insufficient to provide an appropriate response to a specific crime phenomenon and therefore member states unanimously agree that there is a clear need to install increased cooperation with respect to a certain offence type, that decision only logically entails a – be it implicit – commitment to also ensure the availability of data to assess whether the joint response is appropriate or needs to be refined. Member states are to see to it that their national data providers can comply with corresponding EU data requests.

Within the EU's criminal policy sphere, there is a good and obvious basis that can be used as the foundation of a data availability policy. For each of the EU's top-10 priority offences, common minimum criminalisation standards have been unanimously agreed upon by the member states in the form of an approximating framework decision or similar instruments. In these instruments, member states listed the behaviour that is most reprehensible in the EU and for which criminalisation in each of the member states' national criminal justice systems must be guaranteed. These common criminalisation efforts are the obvious basis to collect comparable statistical data. Undeniably, this is the best approach to tackle the incomparability of crime statistical data due to national criminalisation differences.

In spite of this theoretical foundation for data gathering and comparability, the way in which criminalisation requirements are implemented in the national criminal justice systems have a baleful influence on data availability. Two main problems have surfaced during the analysis. Firstly, it is important to consider future use of a definition when deciding which behaviour falls within the scope of an offence label. If not, the definition itself may undermine future functioning as was illustrated by the problems related to the implementation of fraud against the financial interests of the European Communities for prosecution and conviction based on it. Therefore, it is important to appreciate that a decision to identify and describe the behaviour for which EU cooperation should be stepped-up, should also entail an in-depth consideration of the use of that description in a later stage to evaluate the policy initiatives. Secondly, even if a suitable definition is provided at EU level, criminalisation remains a minimum obligation, which means that member states are free to introduce and/or maintain a more stringent regime criminalising beyond the listed behaviour. As

a consequence, the behaviour identified at EU level is not always easy traceable in the national criminal codes. Some member states had already criminalised the behaviour spread over one or more articles in their criminal code, others have added a paragraph to an existing criminalisation and again others have introduced an entirely separate article criminalising the identified behaviour, regardless of a possible overlap with existing national criminalisation. This patchwork of implementation strategies is perfectly in line with the EU's minimum criminalisation requirements, but hinders the identification of cases and convictions for which the underlying behaviour is to be included in EU level statistical analyses. This explains why data availability is currently extremely poor. However, for the abovementioned reasons, the EU should not put up with that. Approximation obligations are currently the only empirically sound basis to ensure the collection of comparable data and it is the responsibility of the member states to ensure that their data systems are built in such a way to be able to separate the data needed to support and evaluate EU level criminal policy making. The architecture could distinguish between so-called *type 1cases* that relate to behaviour identified at EU level and *type 2 cases* that are not linked to behaviour identified at EU level. This would significantly facilitate data exchange and such separation is the only way to guarantee the credibility of EU level criminal policy making and maintain its acceptability for the future. Looking at the current organisation of the data systems and the availability of integrated crime statistics at national level, it is clear that we will not have the data we want by tomorrow. Integrated crime statistics are still a big concern at national level. However, it should be equally clear that the EU is justified to claim that data today, and should do so even if it were just to raise awareness at national level of the importance of developing and maintaining a criminal data system that is not just a compilation of data but is organised in a way to support and evaluate criminal policy making at national and at EU level.

5.2 Ensuring the availability of more detailed data

Second, the EU policy maker must further support (research) initiatives that aim to increase the availability of more detailed data. It is vital to combine rather legal incidence studies with more criminological phenomenological studies, especially when the results are intended to support and evaluate criminal policy making. In order to conduct empirically sound phenomenological studies, mere incidence data is insufficient and more detailed information is indispensable to be able to analyse the phenomenon from a larger contextual perspective. To be able to develop a policy to ensure data availability, it is important to first and foremost reach consensus on the information needed. The requirements are strongly dependent on the phenomenon with which one is confronted. Therefore it is crucial to first look into the requests of the phenomenological researchers,

thereafter into the different data providers that need to be included and finally into the data availability in the different data systems. Additionally, completing so-called official crime statistical data from actors within the criminal justice chain with data from other parties is important to obtain a complete phenomenological picture. In goes without saying that research into money laundering practices would benefit from data input from banking and insurance actors (Bantekas 2006). Similarly, research into illegal immigration would benefit from data input from (non)governmental social care and assistance organisations. The only phenomenon to date for which this kind of groundbreaking research has been conducted is trafficking in human beings. In light thereof, it is convenient that the data availability assessment underlying this contribution looked into detailed (be it incidence) data for trafficking in human beings. It can only be applauded that there is political and financial support for studies that aim to increase the availability of more detailed data that goes beyond mere incidence data. Reference can be made to e.g. the MON-EU-TRAF studies (Di Nicola 2004; Savona et al. 2002) and the SIAMSECT study, which aimed at elaborating an EU template and data collection plan for statistical information and analysis on missing and sexually exploited children and trafficking in human beings (Vermeulen et al. 2006). It was funded by the European Commission under the Daphne II programme. Additionally, to corroborate the research results, the European Commission cooperated with the International Labour Organisation to support the DELPHI-research study, also aiming at reaching consensus amongst a wide group of experts on a selected list of indicators that were required for meaningful data collection and analysis in the context of trafficking in human beings (European Commission 2006b). A project undertaken by the International Organisation for Migration in cooperation with the Austrian Ministry of Interior equally resulted in a publication of the core-indicators of trafficking in human beings, including information on victims, actors, and other phenomenological characteristics (International Organisation for Migration and Austrian Ministry of Interior 2009). Similarly the International Centre for Migration and Policy Development also teamed up with the Czech Ministry of Interior to draw up a handbook on data collection and information management (International Centre for Migration and Policy Development and Ministry of Interior of the Czech Republic 2009). Against this background of consecutive research projects, the European Commission recently funded the MONTRASEC study that developed an IT tool to put the various described data collection mechanisms into practice and test the feasibility of actually gathering data to describe, interpret and analyse phenomena in a multidisciplinary fashion (Vermeulen and Paterson 2010). It proved that it is actually possible to move beyond theoretical discussions concerning data collection to a point where all data providers are prepared to work within a unified and consistent data collection regime that allows cross-

country analysis and produce evidence that is empirically sound to be used as an evidence base for criminal policy making.

In spite of good intentions, using statistical data to actually support evidence based European criminal policy is far from reality. The availability of high quality comparable crime statistical data is nowhere near the level needed to support and evaluate European criminal policy making and guarantee the credibility of evidence based policy making at EU level.

For long, the development of European criminal policy has been ill-considered in absence of a long term and consistent policy plan, because member states were not prepared to give up part of their sovereignty in the context of criminal law. The tailor made decision making procedure in the context of the development of the three-pillar structure comes to that testimony. The abolishment of the three pillar structure and the decision to apply the ordinary decision making procedure also in the context of criminal law is nothing less but a true mile stone in the development of the European criminal policy area. It is clear that we have passed the stage of infancy and that it is the joint responsibility of all EU member states to guide this policy domain to become a well-balanced and stable adult. A commitment to do whatever is necessary to provide a solid evidence base for its policy making, is the only way this policy domain will be accepted as a trustworthy adult.

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Double criminality in international cooperation in criminal matters

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Published in G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality. Antwerp-Apeldoorn-Portland: Maklu.

Double criminality in international cooperation in criminal matters

One of the first questions member states are confronted with in relation to international cooperation in criminal matters is what to do with a request that relates to behaviour that would not constitute an offence if committed in their jurisdiction. Because there is no such thing as an EU criminal code and the 27 member states have their own distinct criminal codes, differences in substantive criminal law are still widespread.[149] Situations may occur in which a member state receives a cooperation request/order with respect to behaviour that is not equally criminalised in its national law and therefore does not pass the so-called double criminality test. This chapter will demonstrate that the answer to the question whether cooperation is still allowed, required or prohibited in absence of double criminality is far from straight forward.

1 Introduction

1.1 Double criminality: what's in a name?

As an important preliminary note, it must be stressed that there is no definition of the concept of double criminality and in literature various *"related concepts"* can be found.[150] Analysis reveals that defining the concept is challenging because double criminality appears in almost as many shapes and sizes as the instruments it is used in. Because it is not clear which requirements can or should be brought under the concept of double criminality, describing it

[149] Even though there are a lot of similarities in the behaviour that is criminalised throughout the criminal codes of the 27 member states, there are a lot of differences. Reference is traditionally made to the sensitivity surrounding the inclusion of abortion and euthanasia within the scope of murder See e.g. Cadoppi, A. (1996). Towards a European Criminal Code. European Journal of Crime, Criminal Law and Criminal Justice, 1, 2.. Furthermore, it is incorrect to think that EU intervention through the adoption of minimum rules in approximation instruments rules out further existence of difference. EU approximation only consists of the introduction of minimum standards with respect to offences and leaves it up to the member states to introduce a more strict legal regime.

[150] See also PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., Double Criminality, Uppsala, Iustus Förlag, 1989, p 84-134, who refers to the terminological chaos caused by the (distinct) use of double criminality, double punishability, double penalization, dual (criminal) liability, dual incrimination, double prosecutability, double culpability, equivalency of offences and even reciprocity of offences. See also WILLIAMS, S. A. "The Double Criminality Rule and Extradition: A Comparative Analysis." Nora Law Review 1991, 3, p 581-623, who also refers to dual criminality or duality of offences.

as *requiring that the behaviour constitutes an offence in both states*, may not suffice[151], when taking account of the diversity illustrated by the following examples.

- The European Union Conventions on Transfer of Proceedings and the Enforcement of sanctions require that *the underlying act be an offence in the requested state if committed on its territory*;
- In the Framework decision on the European Arrest Warrant, it is required that the act constitutes *an offence under the law of the executing member state, whatever the constituent elements or however it is described*; This formulation does not include a specific reference to territoriality and points to the irrelevance of the labelling of the offence;
- The Council of Europe Conventions on the Transfer of Proceedings and International Validity of Judgements require *the act to be an offence if committed on the territory of the requested state* and *the person on whom the sanction was imposed liable to punishment if he had committed the act there*. This formulation does not only require that the act involved constitutes an offence, but also that the person involved can be held liable for that offence;
- In the Framework decision on the mutual recognition of confiscation orders, it is required that *the act constitutes an offence which permits confiscation under the law of the executing state, whatever the constituent elements or however it is described under the law of the issuing state*. This formulation indicates that mere double criminality of the act is not enough; even if the act in relation to which confiscation is requested constitutes an offence in the requested member state, cooperation can still be refused based on the fact that – according to the national law of the requested member state – confiscation is only possible in relation to a limited set of offences; and
- In the Council of European Extradition Convention it is stipulated that *extradition shall be granted in respect of offences punishable under the laws of the requesting state and of the requested state by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting state, the punishment awarded must have been for a period of at least four months;* This formulation adds sanction thresholds to the mere double criminality of the act.

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[151] ALEGRE, S. and LEAF, M. "Chapter 3: Double Criminality", in ALEGRE, S. and LEAF, M., European Arrest Warrant - A solution ahead of its time?, JUSTICE - advancing justice, human rights and the rule of law, 2003, p 34-52; THOMAS, F. De Europese rechtshulpverdragen in strafzaken. Gent, Rijksuniversiteit te Gent, 1980, 520p; VAN DEN WYNGAERT, C. Kennismaking met het Internationaal en Europees strafrecht. Antwerp - Apeldoorn, Maklu, 2003, 138p;

As a result, in literature various attempts have been made to catalogue the differences and classify the different types of double criminality. The combination between the requirement that the *behaviour* is punishable in both member states and the requirement that the *sanction* meets a certain threshold, is sometimes referred to as a type of *qualified double criminality*[152]. However, the concept of qualified double criminality is also used to describe the situation where the double criminality should not only be assessed from an abstract perspective (i.e. whether the *behaviour* is punishable in both states), but should also be assessed from a more concrete perspective (i.e. whether the *person* would have been punishable if the behaviour was committed in the territory of the other member state), pointing to the possible influence of differences in justification grounds (e.g. self defence, force majeur).[153] This latter (less frequent) interpretation of qualified double criminality, is more commonly referred to as the *in concreto* double criminality test. Additionally, a distinction is made between double criminality *in abstracto*, referring to the criminalisation of the type of the act (be it or not linked to a certain sanction threshold) and the double criminality *in concreto*, looking also into the punishability or prosecutability of the perpetrator.[154] To avoid confusion, neither the concept of *qualified* double criminality, nor *in abstracto* or *in concreto* double criminality are used.

More important though than the terminological discussions and the attempts to classify the different types of double criminality, is an argumentation that can either justify or preclude recourse to a double criminality requirement in whatever configuration. This discussion is never reflected let alone thoroughly analysed in literature.

1.2 Two-party talk between the member states involved

First and foremost, the position of the double criminality requirement is the result of a talk between the member states involved. The metaphor of a two-party talk is use to reflect the distinction between the position of the member states as issuing/requesting member states and as executing/requested member states.

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[152] See e.g. CLEIREN, C. P. M. and NIJBOER, J. F. Tekst en Commentaar: Internationaal Strafrecht. Deventer, Kluwer, 2011, 2366p.

[153] PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., Double Criminality, Uppsala, Iustus Förlag, 1989, p 84-134.

[154] See e.g. FICHERA, M. *The implementation of the European Arrest Warrant in the European Union*: Law, Policy and Practice. Cambridge-Antwerp-Portland, Intersentia, 2011, 253p. or VAN DEN WYNGAERT, C. "Double criminality as a requirement to jurisdiction", in JAREBORG, N., Double criminality, Uppsala, Iustus Förlag, 1989, p 43-56.

Where double criminality is said to have been originally developed as a mechanism to avoid that member states were obliged to cooperate with respect to behaviour they did not consider criminally actionable[155], there is an important recent trend of abandoning the double criminality requirement in favour of efficient rendering of justice. Apparently, member states no longer consider it *a fortiori* problematic to cooperate in the event the behaviour underlying the cooperation request is not considered to be criminal not even for forms of cooperation that were traditionally strongly linked to double criminality.[156]

The position of the member states to either or not want to cooperate is centred around two main arguments that often though not necessarily coincide: the type of cooperation and the capacity implications.

First, it is important to appreciate that there is an entire spectrum comprising different forms of cooperation for which the answer to the double criminality question is likely to differ. Double criminality has never been and should never become a general requirement throughout cooperation instruments. Though for some forms of cooperation double criminality was never an issue, it is understandable that member states wanted – and still want – to limit some other forms of cooperation based on a double criminality requirement with a view to remaining master in their own territory and decide how to deal with certain behaviour.[157] To be able to provide an overview of the position of double criminality in international cooperation in criminal matters that sufficiently differentiates between the different forms of international cooperation, a distinction was made between 7 domains of cooperation.[158] These domains

[155] PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., Double Criminality, Uppsala, Iustus Förlag, 1989, p 107.

[156] See e.g. current surrender scene whereas in the context of the traditional extradition scene double criminality is said to be a principle of customary international law.

[157] This position is not shared by all academics. See e.g. KLIP, A. "European integration and harmonisation and criminal law", in CURTIN, D. M., SMITS, J. M., KLIP, A. and MCCAHERY, J. A., European Integration and Law, Antwerp - Oxford, Intersentia, 2006, p147. He has elaborated on a proposal that involves complementing the abandonment of the double criminality requirement with the introduction of a strict territoriality based jurisdiction.

[158] Older overviews of the position of double criminality in international criminal law make a distinction between 5 cooperation types, being extradition, judicial assistance, recognition of foreign penal judgments, transfer of criminal proceedings and enforcement of foreign penal judgements. See e.g. PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., Double Criminality, Uppsala, Iustus Förlag, 1989, p 84-134. Considering the evolution in European criminal law, it was decided to join *recognition and enforcement* and add three domains, being the transfer of pre-trial supervision, the exchange of criminal records and the relocation and protection of witnesses as separate domains for the analysis. Additionally, the scope of the joint 'recognition and enforcement of foreign penal judgements' was extended to 'international validity and effect of decisions', to encompass the taking account of prior convictions in new (criminal) proceedings and similar forms of making

mirror the clusters developed when outlining the methodology for this study, designed around 7 domains of cooperation, being: (1) mutual legal assistance, (2) transfer of pre-trial supervision, (3) extradition and surrender, (4) exchange of criminal records, (5) relocation and protection of witnesses, (6) transfer of prosecution, (7) international validity and effect of decisions. For each of these domains the position of the double criminality requirement will be assessed consecutively. Considering the appearance of the concept of 'extraditable offences' in various cooperation instruments beyond the extradition domain, extradition needs to be thoroughly assessed first. Thereafter, the domains will be dealt with in the above indicated consecutive order.

Second, empirical data gathered in a previous study demonstrated – especially now the cooperation scene is changing from request-based into order-based – that capacity issues increasingly gain attention.[159] It will be looked into to what extent member states should be allowed to engage in a debate on the acceptability of upholding a double criminality requirement with respect to forms of cooperation that would have a significant operational or financial capacity impact. It is a valid concern of member states to want to retain the power to decide when a situation is serious enough to justify the use of certain investigative capacity. Especially when double criminality is not met, member states may deem that the investigative capacity does not weigh up to the relative seriousness of the case.[160] In parallel it is interesting to assess to what extent it is feasible to overcome (double criminality related) capacity concerns by allowing the requesting or issuing member state to use its own capacity to complete the request or order. From the perspective of the issuing or requesting member state it can be reviewed to what extent it may be expected that responsibility is taken to execute own requests or orders when a (double criminality related) capacity concern leads to refusal. From the perspective of the requested member state, it can be reviewed to what extent moving ahead in a criminal procedure is deemed to be so important that they ought to accept the presence of another member state on their territory. This policy option can be summarised in the feasibility of the introduction of an aut exequi aut tolerare principle.

Based on the (possible) conflict of interest between on the one hand the member state that seeks cooperation and on the other hand the member state that wishes to retain the power to decide to either or not take up that

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sure that foreign decisions have effects equivalent to national decisions in a member state's legal order.

[159] See VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? Antwerp-Apeldoorn-Portland, Maklu, 2010.

[160] Even though capacity objections are linked to double criminality issues in this paragraph, capacity can also be a concern in relation to situations where double criminality is met.

request/order, the current position of double criminality in international cooperation in criminal matters can be reviewed. However, the double criminality question is not confined to a two-party talk between the two (cooperating) member states. The issue is more complex and requires a four-party talk. Besides the (cooperating) member states, both the European Union in its capacity of a policy maker and the person involved deserve a seat at the reflection table.

1.3 The European Union as the third party

In addition to the member states involved, it would make sense that the EU joins as a third party in the discussions on the position of the double criminality requirement. Even though the member states *are* the EU, especially when it comes to criminal policy making, the added value of the EU as a third party consists of its role to strive for consistency in EU policy making and to that end safeguard the approximation acquis.

The answer to the question to what extent double criminality can/should/may limit international cooperation in criminal matters, is closely intertwined with the development of an EU criminal policy with respect to a limited number of offence labels. Ever since the Amsterdam Treaty introduced the possibility to approximate the constituent elements of offences[161], the EU has adopted several instruments in which it requires member states to ensure that the included behaviour constitutes a criminal offence. This obligation inevitably also has its influence on the position of double criminality limits to international cooperation in criminal matters in relation to those offences. It would be inconsistent to require member states to ensure that behaviour constitutes an offence and at the same time allow member states to refuse cooperation in relation to that behaviour for double criminality reasons.

To reinforce the approximation obligations and reinforce its policy with respect to those offences, the EU has a legitimate reason to prohibit the use double criminality as a refusal ground with respect to approximated parts of offences. Member states that have complied with the criminalisation obligation will not have a double criminality issue and member states that have not complied with the criminalisation obligation will not have the right to use their lagging behind as an argument to refuse cooperation.

[161] See old Art. 31 (e) TEU.

In order to conduct such an assessment, it is important to know which offences have been subject to approximation and thus for which offences the EU is building an EU criminal policy. To visualise the current so-called *approximation acquis*[162], a table is inserted below providing an overview of the offence labels and the instruments in which a definition thereto is included.

Offence label	as it has been defined in
Euro counterfeiting	Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro *as amended by* the Council Framework Decision 2001/888/JHA of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro
Fraud and counterfeiting non-cash means of payment	Council Framework Decision 2001/413/JHA of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment
Money laundering	Joint Action 98/699/JHA of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime *repealed and replaced by* the Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime

[162] The possibility to approximate offences and sanctions was formally introduced at EU level in Artt. 29 and 31(e) TEU as amended by the Amsterdam Treaty. They allowed for the adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. To that end Art. 34 TEU introduced the framework decision. With the entry into force of the Lisbon Treaty, the framework decision has been replaced by the directive. Therefore, this table also includes the post-Lisbon directives. For reasons of completeness the table also includes the references to the relevant joint actions, that can be characterized as the predecessors to the framework decisions. As argued elsewhere, it is important to note that the actual approximation acquis extends beyond this traditional *framework decision only*-view even when it is complemented with joint actions and directives. See e.g. DE BONDT, W. and VERMEULEN, G. "Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system", in COOLS, M., Readings On Criminal Justice, Criminal Law & Policing, Antwerp - Apeldoorn - Portland, Maklu, 2009, 2, p 87-124; DE BONDT, W. and VERMEULEN, G. "Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU", in COOLS, M., Readings On Criminal Justice, Criminal Law & Policing, Antwerp-Apeldoorn-Portland, Maklu, 2010, 4, p 15-40

Offence label	as it has been defined in
Terrorism	Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism *as amended by* Council Framework Decision 2008/919/JHA amending Framework Decision 2002/475/JHA on combating terrorism
Trafficking in human beings	Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children *repealed and replaced by* Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings *repealed and replaced* by Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA
Illegal (im)migration	Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, *as complemented by* the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence
Environmental offences	Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law and Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution *annulled and replaced by* Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law
Corruption	Joint Action 98/742/JHA of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector *repealed and replaced by* the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector

Offence label	as it has been defined in
Sexual exploitation of a child and child pornography	Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children *repealed and replaced by* the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography *repealed and replaced by* Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.
Drug trafficking	Joint Action 96/750/JHA of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking *replaced by* the Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking
Offences against information systems	Council Framework Decision 2005/222/JHA of 21 February 2005 on attacks against information systems
Participation in a criminal organisation	Joint action 98/733/JHA of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union *repealed and replaced by* the Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime
Racism and xenophobia	Joint Action 96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia *repealed and replaced by* the Council Framework Decision 2008/913/JHA of 29 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law

Additionally, because capacity concerns increasingly gain attention – especially now cooperation is changing from request-based into order-based – it is valid to look into the link between those capacity concerns as refusal grounds and the approximation acquis. If member states link (and thus limit) the use of capacity concerns to situations in which double criminality is not fulfilled and those member states have also unanimously agreed to approximate certain offences, it is only logical to formulate the capacity based refusal ground in a way that clarifies that it is inacceptable to use double criminality as a refusal

ground in relation to offences that have been subject to approximation. Hence, this means that cooperation for cases in relation to offences that have been subject to approximation can never be hindered by capacity concerns. However, member states may also decide that it is acceptable to use capacity as a refusal ground even when double criminality is met, which means that also cases in relation to offences that have been subject to approximation can be hindered by capacity concerns. In this scenario it would be interesting for the European Union in its capacity of a policy maker to bring the acceptability of the *aut exequi aut tolerare* principle to the table, which would attach consequences to using capacity as a refusal grounds in relation to (all or some of the) offences that have been subject to approximation. For the issuing or requesting member state, this would entail the commitment to use its own capacity to complete the order or request; for the requested member state this would entail the obligation to accept the presence of and execution by another member state.

1.4 The person involved as the fourth-party

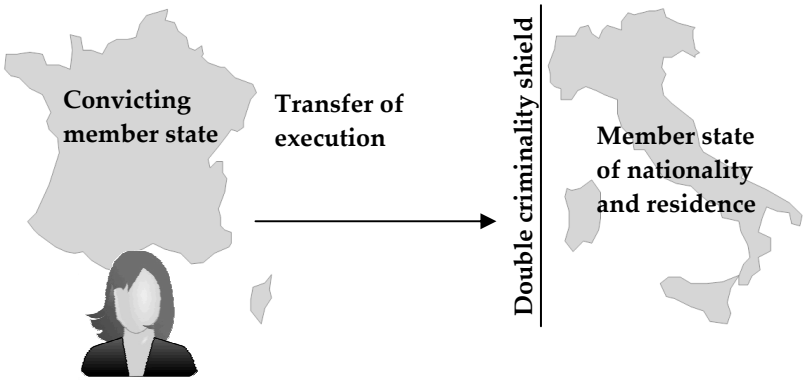
The fourth party that deserves a seat at the reflection table is the person involved. The answer to the question to what extent double criminality can limit international cooperation in criminal matters has a direct impact on the position of the person involved; a direct impact on whether or not she will be subject to e.g. extradition, investigative measures, cross-border execution of a sentence. Obviously, whereas the reservation to cooperate in absence of double criminality may form a relatively strong shield[163] from being subjected to any kind of criminal procedural measure for the person involved, this shield is significantly losing its strength with the negotiation and adoption of each instrument in which member states agree to cooperate in spite of lack of double criminality. This trend is not problematic as a person can never claim the right to benefit from the protection of the double criminality shield. The double criminality limit to international cooperation is not a vested right.[164]

[163] "Relatively strong" because double criminality has never been a general requirement shielding the persons involved from any kind of cooperation in criminal matters. As will become clear in the overview provided some forms of cooperation have never been subject to a double criminality requirement.

[164] Analysis will reveal that there is no existing international (human rights based) obligation to retain double criminality as a refusal ground in any of the forms of internation cooperation in criminal matters.

On the other hand, calling upon a double criminality requirement can also run counter the interests of the person involved. The rehabilitation interest that is now strongly emphasized in the context of transfer of execution of custodial sentences[165], can serve as an example here.

A conflict may rise between the double criminality requirement and the rehabilitation interest. If the person involved is found in the convicting member state, that member state – though it does not need the cooperation from any other member state to ensure execution of its sentence – may wish to call upon e.g. the member state of the person's nationality and residence for the execution of the sentence, as is visualised in the figure inserted below. This would fit perfectly to the recent focus on the principle of rehabilitation the application of which may lead to the conclusion that the person involved would be better off – in terms of rehabilitation opportunities – in the member state of her nationality and residence.



In this particular scenario, the use of double criminality as a refusal ground is not linked to either or not executing the sentence, but is linked to the *location* of the execution. Refusal will mean that execution in the country of nationality and residence is impossible and will "*condemn*" the person to execute her sentence in the convicting member state, in spite of (potentially) better rehabilitation opportunities in the member state of nationality and residence. In this scenario it would go against the – rehabilitation inspired – interests of a convicted person to

[165] With the coming into office of Ms. Reding as the Commissioner for Justice, rehabilitation has assumed a high place on the political agenda. See also: VERMEULEN, G., VAN KALMTHOUT, A., PATERSON, N., KNAPEN, M., VERBEKE, P. and DE BONDT, W. Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures. Antwerp-Apeldoorn-Portland, Maklu, 2011, 310p

refuse the transfer of execution to her member state of nationality and residence purely based on the lack of double criminality.

Either or not seeking recourse to double criminality as a limit to international cooperation in criminal matters can significantly impact on the position of the person involved, both to its advantage as well as to its disadvantage. The question arises what the right balance would be between the ability for a member state to seek recourse to the double criminality requirement to limit international cooperation and the rehabilitation objectives underlying the transfer of execution.

1.5 Four-party talks

Against the background of those basic considerations with respect to the concept of double criminality (i.e. the lack of a proper definition and the variety in its formulation and requirements) and in light of the interests of the four parties involved, the actual position of double criminality in each of the different forms of cooperation will be critically reviewed.

2 Extradition and surrender

The first domain under review consists of extradition and surrender. After detailing the position of the double criminality requirement in this domain, it will be argued that (1) the evolution from extradition to surrender has not consistently dealt with the fate of the outdated concept of *'extraditable offences'*, (2) the abandonment of the double criminality requirement for a set of offence labels for which the definition is left to the discretion of the issuing member states might have been too much too soon for the executing member states to handle, (3) the absence of a link between the double criminality requirement and the approximation acquis runs the risk of undermining the acquis if member states have not correctly implemented their approximation obligations and (4) that there is no vested right for the person involved to benefit from a double criminality shield in an extradition or surrender context.

2.1 Extraditable offences: double criminality as a rule of customary law

Extradition is a form of cooperation through which one member state hands over a person that is either a suspected or convicted criminal in another member state. Because handing a person over to another member state constitutes a significant contribution to a criminal procedure held in another member state, this cooperation form has always been dependent on the condition that the offence was punishable in both the issuing and the executing member state.[166] As a result, double criminality is sometimes even referred to as a customary rule of international law with respect to extradition.[167]

Furthermore, member states have always complemented this double criminality requirement with sanction thresholds. CoE Extradition is the first relevant multilateral European extradition instrument scrutinized. Art. 2.1. CoE Extradition elaborates on the concept of extraditable offences. It explains that extradition shall be granted in respect of offences punishable under the laws of the requesting state and of the requested state by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty. Where a conviction and prison sentence have occurred or a detention order has been made in the territory of the requesting state, the punishment awarded must have been for a period of at least four months. In sum, the *in abstracto* threshold was set at 1 year and the *in concreto* threshold was set at 4 months.[168] If the request for extradition includes several separate offences each of

[166] VERMEULEN, G. VANDER BEKEN, TOM "Extradition in the European Union: State of the Art and Perspectives." European Journal of Crime, Criminal Law and Criminal Justice 1996, p 200-225; KONSTANDINIDES, T. "The Europeanisation of extraditions: how many light years away to mutual confidence?", in ECKES, C. and KONSTANDINIDES, T., Crime within the Area of Freedom Security and Justice. A European Public Order, Cambridge, Cambridge University Press, 2011, p 192-223

[167] See e.g. PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., Double Criminality, Uppsala, Iustus Förlag, 1989, p 84-134. However, considering the exceptions that exists for example between the Nordic Countries, where extradition is possible without a double criminality verification (see more in detail: TRÄSKMAN, P. O. "Should be take the condition of double criminality seriously?", in JAREBORG, N., Double criminality, Uppsala, Iustus Förlag, 1989, p 135-155) this connotation is deemed to be too strong.

[168] Even though the concepts of *in abstracto* double criminality (i.e. looking only at the criminalisation of the underlying behaviour and where applicable the sanction threshold) and *in concreto* double criminality (i.e. looking also at the punishability and prosecutability of the person in the concrete case), the terms *in abstracto* and *in concreto* will be used in the context of the interpretation of the threshold. The provisions regulating the double criminality requirement distinguish between on the one hand the situation where the person still has the status of a suspect in which case the threshold in the issuing/requesting member state is

which is punishable under the laws of the requesting state and the requested state by deprivation of liberty or under a detention order, but of which some do not fulfil the condition with regard to the aforementioned sanction threshold, the requested state will have the discretion to decide whether or not to grant extradition.[169]

Within the EU the concept of extraditable offences was slightly adjusted with the introduction of the 1996 Convention relating to extradition between the member states of the European Union.[170] Art. 2.1. EU Extradition elaborates on the concept of extraditable offences and explains that extradition shall be granted in respect of offences which are punishable under the law of the requesting member state by deprivation of liberty or a detention order for a maximum period of at least 12 months and under the law of the requested member state by deprivation of liberty or a detention order for a maximum period of at least six months.

This means that – as shown from the table below – the *in concreto* threshold was raised from four (in Art. 2.1. CoE Extradition) up to six months (in Art. 2.1. EU Extradition), without any form of justification, not even when compared to existing regional instruments. The Benelux Extradition Treaty for example lowered the *in abstracto* CoE threshold by rendering offences extraditable as soon as they are punishable with a deprivation of liberty of at least six months or punished with a detention order if a maximum period of at least four months.

	In abstracto in the IMS	In abstracto in the EMS	In concreto in the IMS
CoE Extradition	1 year	1 year	4 months
Benelux Extradition	6 months	6 months	4 months
EU Extradition	12 months	12 months	6 months

The coexistence of these instruments created the rather complex situation in which the sanction threshold and therefore the scope of the extraditable offences was dependent on the ratification process in each of the individual member states.

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assessed in an abstract way, looking into the sanction that might be imposed and on the other hand the situation where the person has already been convicted in which case the threshold in the issuing/requesting member state is assessed in a concrete way, looking at the sanction that was imposed.

[169] For reasons of completeness, it should also be mentioned that political, military and fiscal offences are also excluded from the scope of extraditable offences.

[170] Hereafter abbreviated as EU Extradition.

2.2 Surrenderable offences: double criminality for non-listed offences

Nowadays, within the EU, the concept of extraditable offences has lost its meaning following the introduction of the FD EAW and the associated evolution from *extraditing* to *surrendering*. This evolution has important implications for the double criminality requirement that was traditionally included as a limit to this type of cooperation. The FD EAW introduces a two track approach in that the double criminality requirement is maintained for some situations and lifted for other situations.

As a first track, Art. 2.4 FD EAW maintains the double criminality requirement in that in general surrender may be subject to the condition that the acts for which the European arrest warrant has been issued also constitute an offence under the law of the executing member state. The introduction of the FD EAW again changed the sanction thresholds. The sanction thresholds that were always included in previous instruments have been limited to the perspective of the issuing member state. As shown in the table below, Art. 2.1 FD EAW stipulates that a European arrest warrant may be issued for acts punishable by the law of the issuing member state by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months.

Despite the existence of EU sanction thresholds, those thresholds were not copied into the FD EAW. The *in abstracto* threshold in the issuing member state corresponds to the threshold included in EU Extradition, whereas the *in concreto* threshold in the issuing member states corresponds to the threshold included in a Council of Europe instrument.[171]

	In abstracto in the IMS	In abstracto in the EMS	In concreto in the IMS
CoE Extradition	1 year	1 year	4 months
Benelux Extradition	6 months	6 months	4 months
EU Extradition	12 months	12 months	6 months
FD EAW	12 months	--	4 months

[171] It is not correct to say that the CoE thresholds were copied into the FD EAW, because in many member states 1 year is considered to be longer than 12 months (e.g. in Belgian law, 1 month is considered to be 30 days, as a result of which 12 months is only 360 days, 5 days short of a year).

As a second track, a significant reduction of the double criminality requirement is introduced in the clause in between. Notwithstanding the impact of surrender and therefore the importance of the double criminality requirement, double criminality tests were considered time consuming and therefore obstacles to smooth and timely cooperation.[172] Member states looked into alternative approaches that could facilitate and speed up cooperation. An alternative was found by means of the introduction of the so-called 32 offence list.[173] Art. 2.2 FD EAW is often characterised as the most radical or revolutionary change[174] brought about by the FD EAW as it reduces the possibility of the executing member state to refuse because of not meeting the double criminality requirement, in that a list of 32 offences is introduced for which double criminality verification is abandoned. In as far as the offences are punishable by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing member state, the listed offences are no longer subject to a double criminality verification.

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[172] This position was chiefly voiced by the European Commission, though never supported with convincing empirical evidence. Communication from the Commission to the Council and the European Parliament on Mutual Recognition of Final Decisions in Criminal Matters, COM(2000) 495 final of 26.07.2000.

[173] Several authors have commented on the compilation of the list. The offences are characterised here as semi-ad random, because no clear policy-consistency-rationale was used as a basis for their selection. The list started off with 24 crimes, being eleven crimes considered during the discussions of the freezing orders proposal, twelve crimes taken from the Annex to the Europol Convention and one additional crime that appeared in the Tampere Presidency Conclusions. Later on, the list was complemented with two more so-called Europol offences, an offence that had been subject to approximation and one offence following a specific member state request. The compilation of the list was finalised by including a final set of four crimes See more detailed; PEERS, S. "Mutual recognition and criminal law in the European Union: Has the Council got it wrong?" Common Market Law Review 2004, 41, p 35-36; KEIJZER, N. "The Fate of the Double Criminality Requirement", in GUILD, E. and MARIN, L., Still not resolved?: Constitutional issues of the European arrest warrant, Brussels, Wolf Legal Publishers, 2008, p 61-75; AMBOS, K. "Is the development of a common substantive criminal law for Europe possible? Some preliminary reflections." Maastricht Journal of European and Comparative Law 2005, 12 (2), p 173-191

[174] The European Commission itself stated that the Amsterdam Treaty opened the door to a radical change of perspective: European Commission, Proposal for a Council framework Decision on the European arrest warrant and the surrender procedures between the Member States, 24 September 2001, COPEN 51, 12102/01. See also ALEGRE, S. and LEAF, M. "Chapter 3: Double Criminality", in ALEGRE, S. and LEAF, M., European Arrest Warrant - A solution ahead of its time?, JUSTICE - advancing justice, human rights and the rule of law, 2003, p 34-52; KEIJZER, N. "The Fate of the Double Criminality Requirement", in GUILD, E. and MARIN, L., Still not resolved?: Constitutional issues of the European arrest warrant, Brussels, Wolf Legal Publishers, 2008, p 61-75; KLIP, A. European Criminal Law. An integrative Approach. Antwerp - Oxford - Portland, Intersentia, 2009, 531p.

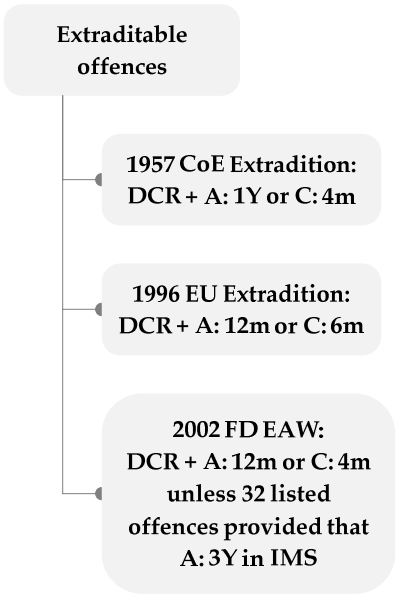
2.3 Viability of 'surrenderable offences' as a substitute for the 'extraditable offences'

From the perspective of the issuing member state, the evolution from extradition to surrender can be criticised for not having dealt with the references to the concept of extraditable offence in other cooperation instruments.

When elaborating on the structure of this chapter, it was clarified that due to frequent references to the concept of 'extraditable offences' in other legal instruments, it was deemed important to first discuss the position of double criminality in the context of extradition/surrender and pay attention to the evolution from the concept of 'extraditable offences' into 'surrenderable offences'.

It is unclear whether the concept of 'extraditable offence' should be reinterpreted in light of the development of the 'extraditable offences' into 'surrenderable offences' following the introduction of the FD EAW. Art. 31 FD EAW that intends to clarify the relation to other legal instruments, remains silent on this topic. Considering that all extradition related instruments and provisions are (to be) reinterpreted in light of the characteristics of surrender, it seems logical to reinterpret 'extraditable offences' into 'surrenderable offences' in light of the scope demarcation in Art. 2 FD EAW. This would mean that within the EU an extraditable offence is no longer subject to a double criminality requirement complemented with sanction thresholds, but is only subject to a double criminality requirement in as far as the offence is not listed amongst the 32 (provided that the behaviour is punishable with at least 3 years in the issuing member state).

The figure inserted below provides an overview of the evolution of 'extraditable offence' as a concept for the European states.

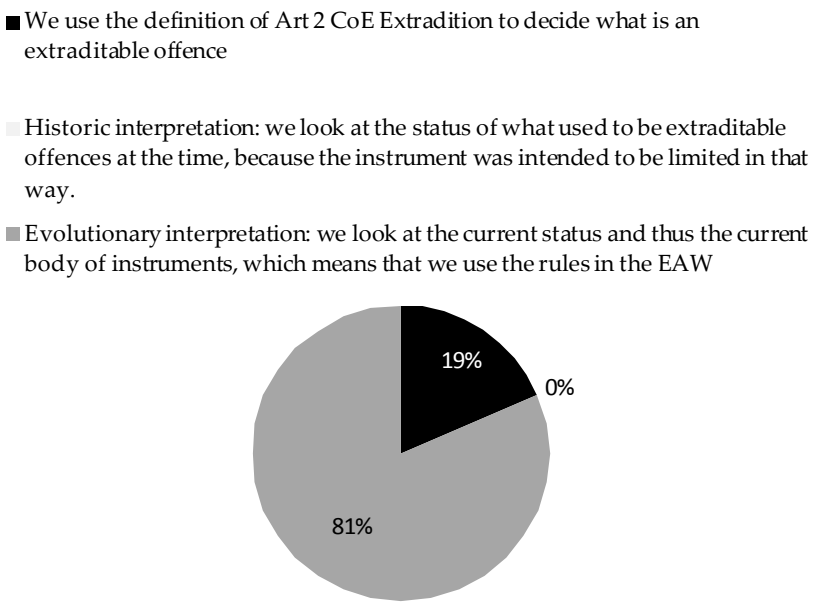


DCR: double criminality requirement | A: threshold in abstracto | C: threshold in concreto | Y: years | M: months | IMS: Issuing member state

In sum, the concept of extraditable offence was introduced in CoE Extradition and referred to offences for which the underlying behaviour was criminalised in both member states and the sanction threshold was either 1 year in abstracto or 4 months in concreto. With the EU Extradition, the concept was redefined and the thresholds changed into 12 months in abstracto and 6 months in concreto. With the FD EAW a two track approach was introduced. In general, the double criminality requirement was maintained, combined with either an in abstracto threshold of 12 months or an in concreto threshold of 4 months. With respect of the 32 listed offences, the threshold requirement was limited to an in abstracto threshold of 3 years in the issuing member state. The question arises whether this last set of requirements defines the new concept of 'surrenderable offences' and can/should be used as a substitute for the existing references to 'extraditable offences'. Because – in absence of a clear provision in Art. 31 FD EAW – there is no hard legal basis to reinterpret 'extraditable offence' in light of

the boundaries of the new concept of 'surrenderable offence', it is deemed necessary to test the member state perspectives with respect to the faith of the 'extraditable offence' and the acceptability of a reinterpretation into 'surrenderable offences'. The explanatory guide to the member state questionnaire briefly situated the outdated character of the concept of 'extraditable offences' as a lead up to a question on the current interpretation thereof. The insight into the current situation based on the replies to question 2.4.1. is reassuring in that none of the member state use a strict historic interpretation that would limit the scope of extraditable/surrenderable offences to what was extraditable at the time of the adoption of the instrument that refers to it. Still 19% of the member states indicate to seek recourse to the original meaning of Art. 2 CoE Extradition which is somewhat outdated, but an interesting 81% of the member states links the interpretation of the extraditable offences to the legal framework foreseen by the FD EAW.

2.4.1 Considering that the concept of extradition has seized to exist among the member states of the European Union, how do you currently interpret that scope limitation?

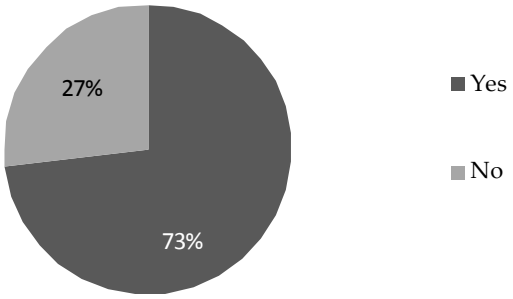


Because the replies to question 2.4.1. reveal that for 81% of the member states the concept of extraditable offences has changed in light of Art. 2 FD EAW this

means that surrender can only be requested for offences that meet the thresholds in Art. 2.1 FD EAW in the issuing member state for which a double criminality test is still allowed. This double criminality test is however no longer allowed for the offences listed in Art. 2.2 FD EAW to the extent they are punishable in the issuing member state with at least three years. In light thereof it becomes interesting to test to what extent it would be acceptable to amend Art. 31 FD EAW and in doing so formally reinterpret the scope of 'extraditable offence' in such a way. One would expect that at least those 81% of the member states would be in favour, maybe even more.

When testing the acceptability of the future policy option to formalise the reinterpretation of extraditable offences into a surrenderable offence in all cooperation instruments, it is surprising that – when analysing the replies to question 2.4.2 – the number of opponents to an evolutionary interpretation has increased from 19% up to 27% (which corresponds to two member states who have changed their position). Nevertheless, still 73% of the member states is in favour of introducing a solid legal basis for the interpretation of the concept of 'extraditable offence' in light of the evolution from extradition to surrender.

2.4.2 Is it an acceptable future policy option for you to amend all remaining provisions that refer to extraditable offences?



The high percentage of member states already reinterpreting this concept in light of the introduction of the surrender procedure via the FD EAW and the amount of member states considering it an acceptable future policy option to amend the remaining references to extraditable offences is not without meaning. Taking account of the new legislative procedure that would govern the

amendment of e.g. Art. 31 FD EAW in such a way, this would mean that the qualified majority would be reached[175] and an amendment is possible.[176]

2.4 Too much too soon?

From the perspective of the executing member state, it can be questioned whether it was a good choice to accept the introduction of such a wide list of offences for which the decision on the exact scope is left to each of the 27 individual member states. In spite of the fact that the member states had unanimously agreed to abandon the double criminality requirement for those offences, it is not clear whether member states where sufficiently aware of the impact of such a decision. Problems could have been expected not only with respect to the implementation of the list but also with respect to the use of the list afterwards. Even a very strong presumption that there will most likely not be any significant double criminality issues[177] will not preclude double criminality issues from occurring, which was incompatible with the national laws of some member states considering the nature of surrender.

At the time of the adoption of the FD EAW the JHA Council had recognised the lack of common definitions for the listed offences and anticipated to the problems it may cause trying to formulate guidelines for the member states with respect to the interpretation of the 32 offence list by clarifying the meaning of some of the offence labels.[178]

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[175] In absolute numbers 20 member states use an evolutionary interpretation, 5 member states uphold a CoE interpretation and 2 member states indicated to use another interpretation in reply to question 2.4.1. With respect to question 2.4.2 19 member states indicated to be in favour, 7 member states indicated to be against a such reinterpretation and 1 member state abstained.

[176] Even against the will of opposing member states.

[177] ALEGRE, S. and LEAF, M. "Chapter 3: Double Criminality", in ALEGRE, S. and LEAF, M., European Arrest Warrant - A solution ahead of its time?, JUSTICE - advancing justice, human rights and the rule of law, 2003, p 34-52; KEIJZER, N. "The Fate of the Double Criminality Requirement", in GUILD, E. and MARIN, L., Still not resolved?: Constitutional issues of the European arrest warrant, Brussels, Wolf Legal Publishers, 2008, p 61-75; VERMEULEN, G. "Mutual recognition, harmonisation and fundamental (procedural) rights protection", in MARTIN, M., Crime, Rights and the EU. The future of police and judicial cooperation, London, JUSTICE - advancing access to justice, human rights and the rule of law, 2008, p 89-104

[178] See 2436th meeting of the Council (Justice and Home Affairs and Civil Protection) held in Luxembourg on 13 June 2002, JAI 138, CONS 33, 9958/02, ADD 1 REV 1 – The Council states that in particular for the following offences, listed in Article 2(2), there is no completely approximated definition at Union level. For the purposes of applying the European arrest warrant, the act as defined by the law governing issue prevails. Without prejudice to the decisions which might be taken by the Council in the context of implementing Article 31(e) TEU, member states are requested to be guided by the following definitions of acts in order to

In spite of the good intentions in the Council the fact that some member states would experience problems with the implementation of the list of 32 MR offences was unavoidable.[179] This is corroborated by the replies to question 2.2.1 from which it becomes clear that half of the member states indicate to have experienced difficulties with the implementation of the 32 MR offence list. The explanatory guide to the questionnaire pointed to the controversial character of the 32 MR offence list and more specifically the abandonment of the double criminality requirement before asking whether the member states had experiences difficulties with the implementation of the 32 MR offence list in relation thereto.

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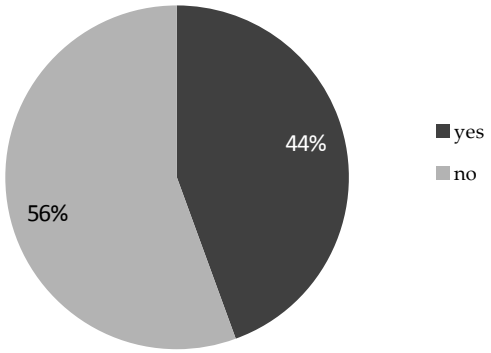
make the arrest warrant operational throughout the Union for offences involving racism and xenophobia, sabotage and racketeering and extortion. *Racism and xenophobia* as defined in the Joint Action of 15 July 1996 (96/443/JAI) *Sabotage*: "Any person who unlawfully and intentionally causes large-scale damage to a government installation, another public installation, a public transport system or other infrastructure which entails or is likely to entail considerable economic loss." *Racketeering and extortion*: "Demanding by threats, use of force or by any other form of intimidation goods, promises, receipts or the signing of any document containing or resulting in an obligation, alienation or discharge." *Swindling* encompasses inter alia inter alia: using false names or claiming a false position or using fraudulent means to abuse people's confidence or credulity with the aim of appropriating something belonging to another person. Only with respect to racism and xenophobia a reference is made to an approximation instrument, even though at the time of the declaration not only 4 more joint actions existed with respect to trafficking in human beings and sexual exploitation of children, corruption in the private sector, drug trafficking and participation in a criminal organisation but also three more approximation instruments existed for euro counterfeiting, money laundering and fraud and counterfeiting of non-cash means of payment. Furthermore, the FD terrorism was adopted on the same day as the FD EAW, so that at least a reference to that instrument should have been included in the interpretation guide as well. Additionally, a partial political agreement was reached with respect to FD trafficking in human beings and proposals had been launched for framework decisions related to illegal migration, environmental crime, sexual exploitation of children, drug trafficking, offences against information systems and racism and xenophobia.

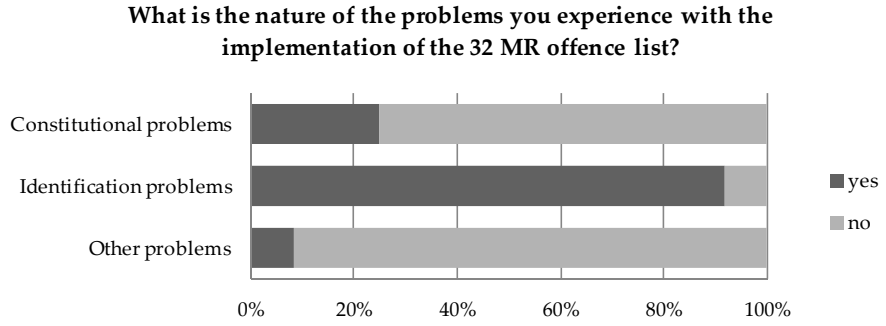
[179] E.g. in the Czech Republic *arson* is not a separate offence. Even though the behaviour falls within the scope of *endangering the public safety*, the scope of that offence exceeds the scope of arson. See also ZEMAN, P. "The European Arrest Warrant - Practical Problems and Constitutional Challenges", in GUILD, E. and MARIN, L., Still not Resolved? Constitutional Issues of the European Arrest Warrant, Nijmegen, Wolf Legal Publishers, 2009, p 107-113; See e.g. also the Belgian implementation act which excludes both abortion and euthanasia from the scope of the listed offence category 'murder'. Art.5 §4 Loi du 19 Décembre 2003 relative au mandat d'arrêt européen, *B.S.* 22 Décember 2003; BAPULY, B. "The European Arrest Warrant under Constitutional Attack." International Criminal Law Journal 2009, 3, p 1-23; KOMÀREK, J. "European constitutionalism and the European Arrest warrant: In search of the limits of contrapunctial principles." Common Market Law Review 2007, 44, p 9-40; LECZYKIEWICZ, D. "Constitutional Conflicts in the Third Pillar." European Law Review 2008, 33, p 230-242;

2.2.1 Have you experienced difficulties with the implementation of the 32 MR offence list?



Striving for a consistent and well balanced EU policy, the fact that 44% of the member states expressly indicate that they have difficulties with the implementation of the 32 MR offence list, cannot be ignored. Furthermore, follow-up questions to member states that had indicated not to experience problems with the implementation revealed that this is partially due to working with so-called blank implementation legislation (i.e. simply referring to the EU instrument without any form of national interpretation of the provisions therein). As a result thereof, interpretation problems will not rise at the time of the implementation but will rise only in a later stage in the context of a specific case.

When further elaborating on the nature of the difficulties experienced, member states had the opportunity to chose one or more of the following reasons: constitutional problems (in the questionnaire formulated as *we experienced problems because our constitution does not allow us to cooperate for acts that do not constitute an offence in our criminal law*), identification problems (in the questionnaire formulated as *we experienced problems because for some offence labels it was not sure which offences of our criminal code would fall under the scope of that offence label*) or other problems which respondents could then elaborate on.



The replies to question 2.2.1 indicate that for 25% of the member states experiencing problems with the implementation this has a constitutional reason. Especially the number of member states that indicate to have had problems with the identification of offences in the national criminal codes that should fall within the scope of the 32 listed offences is extremely high. No less than 92% of the member states that had indicated to experience problems do so in relation to the identification of the offences for which double criminality in the other member states is no longer relevant. Because so many member states struggle with the identification of the offences illustrates that discussions on the scope of the abandonment of the double criminality requirement are unavoidable.

2.5 Safeguarding the approximation acquis

From the perspective of consistent EU policy making and the development of EU priority offences, it was already argued that in as far as the EU has introduced a criminalisation obligation in an approximation instrument, the EU has a legitimate reason to also strengthen those criminalisation obligations through prohibiting member states to call upon a double criminality based refusal ground with respect to those offences.

An evaluation requires cross-checking the then existing approximation acquis with the scope of the abandonment of the double criminality requirement. At the time of the adoption of the EAW, a series of approximating instruments had been adopted, and more were on the way. 5 Joint actions existed with respect to racism and xenophobia, trafficking in human beings and sexual exploitation of children, corruption in the private sector, drug trafficking and participation in a criminal organisation but also three more approximation instruments existed for euro counterfeiting, money laundering and fraud and

counterfeiting of non-cash means of payment. Furthermore, the FD terrorism was adopted on the same day as the FD EAW, which justifies this instrument being included in the comparative analysis. Additionally, a partial political agreement was reached with respect to FD trafficking in human beings and proposals had been launched for framework decisions related to illegal migration, environmental crime, sexual exploitation of children, drug trafficking, offences against information systems and racism and xenophobia.

The wide scope of the list of 32 MR offences is much broader than the approximation acquis, which means that, at the time, from an EU policy perspective, the choice to abandon the possibility to call upon a double criminality issue with respect to an offence that had been subject to approximation, ruled out the use of the refusal ground for member states lagging behind with their implementation obligations.[180]

Even though the evaluation is positive at the time of the adoption of the EAW, this approach will not be able to stand the test of time. The approximation acquis is developing rapidly and therefore the choice for a list of offences included *ad nominem* cannot guarantee that it will never be possible to use double criminality as a refusal ground in relation to the approximation acquis. It is not unimaginable that new approximation instruments are adopted in relation to offences that are not included in the list.[181] From that perspective, it would have been a better policy option for the EU as a policy maker to include an explicit provision that prohibits the use of double criminality as a refusal ground in relation to offences that have been subject to approximation, at any given time. In doing so, both the approximation instruments adopted at the time as well as the new instruments that will be adopted in a later stage are included in the provision prohibiting the use of double criminality as a refusal ground.

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[180] This position has to be nuanced in light of the translation issues that have arisen with respect to the offence labels included in the 32 MR offence list. This is elaborated on in GUILD, E. Constitutional challenges to the European Arrest Warrant. Nijmegen, Wolf Legal Publishing, 2006, 272p. It is clarified that the English version of the 32 offence list for which double criminality is abandoned refers to computer-related crime. Similarly, the Dutch version refers to informaticacriminaliteit. The French version however refers to cybercriminalité, which is similar to the German version which refers to Cyberkriminalität. It has been argued that computer-related crime is a larger concept when compared to cybercriminalité. A similar argumentation is developed for racketeering and extortion, which is translated to racket et extorsion de fonds in French and Erpressung und Schultzgelderpressung in German which seems to mean that extortion of other than financial products is not included in the French nor German versions where such delineation cannot be substantiated looking only at the English version.

[181] The preparations for the adoption of a post-Lisbon directive on market abuse and market manipulation can support that concern. Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, of 20.10.2011.

To ensure the user friendliness of such a provision and to avoid that practitioners need to scan the EU instrumentarium to compile the approximation acquis at any given time, it is advised to draw up a separate instrument that brings together the approximation acquis (e.g. under the auspice of the European Commission) and is permanently updated and accessible for anyone to consult. The elaboration of such instrument has been prepared in the context of a previous study in which EULOCS (short for EU level offence classification system) was developed.[182] One of the objectives is precisely to visualise the status of the approximation acquis by separating the jointly identified parts of offences from other parts of offences. When referring to the approximated parts of offences, it can be stipulated in surrender (and other cooperation) instruments that member states ought to (1) recognise the classification of the case in either or not relating to a jointly identified and approximated part of an offences and (2) accept that no double criminality verification is allowed when classified as a case for which the underlying behaviour had been subject to approximation. For those member states that have implemented the approximation instruments and have criminalised the included behaviour, this prohibition to test double criminality will constitute a significant time saving measure. Those member states that have not (yet) (correctly) implemented the approximation instrument and (possibly) have a double criminality issue cannot use their lagging behind as a reason to refuse cooperation. Interestingly, the abandonment of the double criminality verification based on a list of offences is not as revolutionary as it may seem for it can already be found in the old Benelux convention on the transfer of criminal proceedings.[183] Its Art. 2.1 states that facts can only be prosecuted in another state if the double criminality requirement is met, or if it is one of the facts included in the list annexed to the convention.[184] The annex consists of a conversion table providing the offence label and the corresponding criminalisation provisions in each of the three cooperating member states. In doing so, the double criminality verification is lifted in those situations where the criminalisation provision is known in each of the member states, which is exactly what is intended with the use of EULOCS as a tool to support the abandonment of double criminality verifications.

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[182] VERMEULEN, G. and DE BONDT, W. EULOCS. The EU level offence classification system : a bench-mark for enhanced internal coherence of the EU's criminal policy. Antwerp - Apeldoorn - Portland, Maklu, 2009, 212p.

[183] Traité entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas sur la transmission des poursuites, 11 May 1974, Benelux Official Journal, Tome 4-III. Even though it is yet to enter into force, this convention is worth mentioning considering the ideas underlying the content of its annex.

[184] Original text: la personne qui a commis un fait […] ne peut être poursuivie dans un autre état contractant que si, selon la loi pénale de cet état, une peine ou mesure peut lui être appliquée pour se fait ou pour le fait correspondant mentionné sur la liste annexée au présent traité.

2.6 No obligation to maintain a double criminality-based limit

Finally, from the perspective of the person involved it is valid to question whether a member state is allowed to grant unlimited cooperation to a surrender request if the underlying behaviour does not constitute an offence according to its national law. To that end, it is useful to look into Art. 5 ECHR and the case law elaborating on its interpretation. Art. 5 ECHR stipulates that "*everyone has the right to liberty and security of person. No one shall be deprived of his liberty save [...] in accordance with a procedure prescribed by law.*" Undeniably, surrender entails a form of deprivation of liberty which can be difficult in relation to behaviour that is not considered to be criminal. Amongst the exceptions foreseen by Art. 5 ECHR reference is made in point (f) to "*the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition*". The case law interpreting Art. 5 ECHR for example is clear and stipulates that a lawful deprivation of liberty for the purpose of Art. 5. 1 (f) ECHR only requires that action is being taken with a view to extradition making it immaterial whether the underlying decision can be justified under national law.[185] This can be interpreted to mean that questions related to the double criminality of the underlying decision are immaterial to decide on the lawfulness of the arrest and the subsequent extradition.

In the context of extradition/surrender, there are no situations in which the use of double criminality as a refusal ground could run counter the interests of the person involved. Hence there is no need for a discussion on the introduction of possible legal remedies.

3 Mutual legal assistance

Secondly, having developed a benchmark for the interpretation of the concept of extraditable/surrenderable offence and a template to evaluate the double criminality approach introduced in the legal instruments, the same analysis was conducted for mutual legal assistance instruments. After detailing the position of double criminality in mutual legal assistance, it will be argued that (1) due to the fragmented legal framework which does not govern all investigative measures, the position of double criminality is not always clear, (2) the unlimited possibility to issue a declaration not to accept the abandonment of the double criminality requirement effectively undermines the approximation

[185] ECtHR, Case of Chahal v. The United Kingdom, application No 22414/93, 15 November 1996, §112; ECtHR, Case of Čonka v. Belgium, application No 51564/99, 5 February 2002, §38; ECtHR, Case of Liu v. Russia, application No 42086/05, 6 December 2007, §78.

policy to the extent that double criminality verification is possible in relation to offences that have been subject to approximation and (3) there are no supranational or international obstacles to cooperate beyond double criminality.

3.1 No general double criminality requirement in MLA

In a mutual legal assistance context the double criminality requirement has never assumed a prominent position[186]. The wording of Art.1.1 ECMA supports this baseline as it requires member states to afford each other the widest possible measure of assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting state. This corroborates with the idea formulated in the ECMA's explanatory report that mere legal assistance should not necessarily be dependent on a double criminality requirement.[187] Double criminality is therefore not listed among the refusal grounds included in Art. 2 ECMA.[188] However, some states have issued a reservation with respect to these refusal grounds and have added the double criminality requirement thereto.[189]

Whereas mutual legal assistance as an *umbrella* covering different cooperation measures is not necessarily limited along a double criminality requirement, the extent to which double criminality can be justified will require an assessment of each individual cooperation measure brought under that umbrella.

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[186] See also VERMEULEN, G. Wederzijdse rechtshulp in strafzaken in de Europese Unie: naar een volwaardige eigen rechtshulpruimte voor de Lid-Staten? Antwerp-Apeldoorn, Maklu, 1999, 632p; PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., Double Criminality, Uppsala, Iustus Förlag, 1989, p 84-134.

[187] Council of Europe, Explanatory Report on the European Convention on Mutual Assistance in Criminal Matters, Strasbourg 1969, p 14.

[188] Other texts go even further and explicitly say that countries may wish, where feasible, to render assistance, even if the act on which the request is based is not an offence in the requested State (absence of dual criminality). See e.g. footnote added to Art.4.1 Model Treaty on Mutual Assistance in Criminal Matters, Adopted by General Assembly resolution 45/117, subsequently amended by General Assembly resolution 53/112.

[189] It concerns: *Austria* (Austria will only grant assistance in proceedings in respect of offences also punishable under Austrian law and the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities), *Hungary* (Hungary reserves the right to afford assistance only in procedures instituted in respect of such offences, which are also punishable under Hungarian law) and *Lithuania* (Lithuania reserves the right not to comply with a request insofar as it concerns an offence which is not qualified as a "crime" and punishable as such under Lithuanian law), and previously also *Bulgaria* (Bulgaria declares that it will refuse assistance where the committed act is not incriminated as an offence according to the Bulgarian criminal law) but this reservation was withdrawn.

3.2 The search and seizure exception

The only exception to the general rejection of double criminality limits the member states deemed necessary in 1959 is included in Art. 5.1. ECMA and relates to search and seizure of property. States may make the execution of letters rogatory for search or seizure of property dependent on either a basic double criminality requirement or even a more far reaching double criminality requirement by limiting it to extraditable offences. This latter option meant at the time that the double criminality requirement is linked to a sanction threshold as explained above.[190]

The intrusive nature of search and seizure as an investigative measure justifies retaining double criminality as an optional refusal ground.[191] The impact of search and seizure is essentially different from the impact of e.g. a reconstruction or the hearing of a witness for which a double criminality requirement is not necessarily justified. This consideration can also be explicitly found in Art. 18(1)f of the 1990 CoE Confiscation. It stipulates that '*cooperation may be refused if the offence to which the request relates would not be an offence under the law of the requested state if committed within its jurisdiction. However, this ground for refusal applies only in so far as the assistance sought involves coercive action*'.

3.3 Extension to other investigative measures

This double criminality justification also appears in relation to other coercive or intrusive measures. Two different approaches can be distinguished. First, in analogy with the approach developed with respect to search and seizure, a series of other investigative measures use a references to 'extraditable offences' as a way to limit the scope of cooperation. Second, some investigative measures use a reference to 'search and seizure offences' as a way to limit the scope of cooperation. As will be explained, the distinction between those two approaches

[190] It should be noted that even though at the time, a reference to extraditable offences would constitute a more far reaching form of double criminality (i.e. for all offences without exception and including sanction thresholds), the analysis of the concept of extraditable offence elaborated on above has clarified that ever since the introduction of the EAW, this is no longer the case. Not only because the EAW abandons double criminality for the listed offences, but also because the rules regulating the sanction thresholds have been redesigned. In doing so, a reference to extraditable offences is both more strict and more lenient. It is more strict because of sanction requirements for general cases; it is more lenient because of the abandonment of the double criminality requirement for the listed offences.

[191] See also: KLIP, A. European Criminal Law. An integrative Approach. Antwerp - Oxford - Portland, Intersentia, 2009, 531p, 320-321; TRÄSKMAN, P. O. "Should we take the condition of double criminality seriously?", in JAREBORG, N., Double criminality, Uppsala, Iustus Förlag, 1989, p 135-155.

is important for the timing of the abandonment of the possibility to call upon double criminality with respect to the list of 32 MR offences.

First, a number of examples of investigative measures can be listed for which reference is made to 'extraditable offences' as a way to limit the scope. The ECMA and the 2000 EU MLA Convention are the most interesting instruments. When seeking to supplement the ECMA provisions and facilitate mutual legal assistance between member states of the European Union, the 2000 EU MLA Convention was introduced. Reinforcing the position assumed at CoE level, member states upheld the baseline not to limit cooperation along the double criminality requirement.[192] Additionally mirroring the reasoning underlying the introduction of the double criminality requirement with respect to search and seizure, double criminality was scarcely introduced with respect to a limited set of investigative measures that were now explicitly regulated in the EU MLA Convention. As a result, Art. 12 EU MLA with respect to *controlled deliveries* (that was in fact copied from Art. 22 Naples II) stipulates that member states are to ensure that at the request of another member state controlled deliveries may be permitted in its territory in the context of criminal investigations into *extraditable offences*. Considering the meaning of extraditable offences, this means that – at the time[193] – permitting controlled deliveries was dependent, not only on the double criminality requirement but also on meeting the sanction threshold that comes with the concept of extraditable offences. When complementing the ECMA based on the developments in EU cooperation instruments – by copying the EU MLA acquis into the second ECMA protocol – this double criminality requirement for controlled deliveries was copied into Art. 18 Second ECMA Protocol.

Similarly, the reference to extraditable offences included in Art. 40.1 CISA with respect to *cross-border observations* was later copied into Art. 17 Second ECMA Protocol. Police officers are allowed to continue their observation crossing the border into another state only when the person involved is suspected of having committed or having been involved in committing an *extraditable offence*. This means that – at the time[194] – cross-border observations were dependent on a double criminality requirement that was linked to sanction thresholds.

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[192] In the context of a previous study 90% of the member states indicated to be willing to provide cooperation for non-coercive or intrusive measures. See VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? Antwerp-Apeldoorn-Portland, Maklu, 2010.

[193] See *supra* – comment with respect to the interpretation of 'extraditable offence'.

[194] See *supra* – comment with respect to the interpretation of 'extraditable offence'.

Similarly, the reference to extraditable offences included in Art. 41.4. CISA with respect to *cross-border hot pursuit* was later copied into Art. 20 Naples II. Member states may make the acceptance of police officers continuing their hot pursuit across the border into their member state dependent on the fact that the person involved is suspected of having committed or having been involved in committing an *extraditable offence*.

Subsequently, this duality in the appearance and justifiability of the double criminality requirement linked to the intrusive or coercive character of the investigative measure, is mirrored in the existing mutual recognition instruments. Art. 3.4. FD Freezing stipulates that the executing member state may either make cooperation dependent on the condition that the acts for which the order was issued constitute an offence under its laws, when the cooperation request relates to securing evidence, or make cooperation dependent on the condition the acts for which the order was issued constitute an offence which, under the laws of that state, allows for such freezing, when the request relates to subsequent confiscation. Similarly, Art. 14.4 FD EEW stipulates that the executing member state may make search and seizure dependent on the condition of double criminality.

Second, besides investigative measures that include a reference to extraditable offences to regulate the possibility to call upon double criminality issues, there are also investigative measures for which a reference to the provisions with respect to *search and seizure* themselves is made. An example can be found in the EU MLA Protocol. The link between on the one hand data protection concerns and on the other hand requests for information on bank accounts, requests for information on banking transactions and requests for the monitoring of banking transactions, justifies making legal assistance dependent on a type of double criminality requirement. With respect to information on the existence of bank accounts, Art. 1 EU MLA Protocol makes a distinction between Europol offences and other offences. For Europol offences, a traditional 'not further specified'[195] double criminality requirement is introduced, whereas for other offences, a new type of double criminality requirement is introduced: cooperation may be made dependent on it being related to an offence that is punishable with at least 4 years in the requesting member state and 2 years in the requested member state.[196] Additionally, Art. 1 EU MLA Protocol refers to the offences included in the PIF convention, for which it is obvious that the double criminality requirement will be met as a result of the approximation obligations included in that instrument. It is Art. 2 EU MLA Protocol related to

[195] Meaning that the act should be punishable but no sanction thresholds are introduced.

[196] This augmentation of the sanction thresholds that are linked to the double criminality requirement can of course be explained by the nature of the cooperation and the sensitivity that surrounds bank account information.

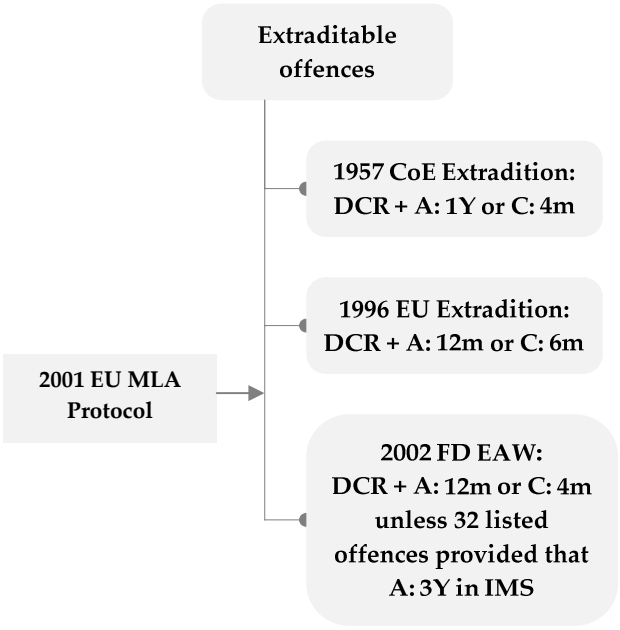
information on bank transactions with respect to a known and identified bank account that refers to the double criminality rules linked to *offences that can be subject to search and seizure*. At the time of the adoption of the protocol in 2001, double criminality with respect to search and seizure was governed by Art. 51 CISA and stipulated that cooperation may be made dependent on being related to an offence punishable with at least 6 months. As a result thereof the double criminality requirement with respect to sharing information on the existence of bank accounts is more strict than the double criminality requirement that governs cooperation with respect to sharing information on bank transactions of known and specified bank accounts. This makes sense considering that once a member state is aware of the existence of a bank account, the issues related to information exchange are no longer as sensitive.

3.4 Limitation by the 32 MR offence list

The practice of allowing member states to call upon double criminality as a limit to cooperation for coercive or intrusive measures was eroded[197] by the introduction of the 32 MR offences that limit that possibility. As a result of the intertwined character of MLA instruments with extradition/surrender instruments today's limits to call upon double criminality issues in the context of surrender are also applicable to or copied into mutual legal assistance. For that list of offences double criminality can no longer be verified provided that the offence is punishable with a custodial sentence of at least three years in the issuing member state. The limitation by the introduction of the 32 MR offence list for which double criminality can no longer be tested entered the MLA scene via two doors. First, there is the introduction of the list in the FD EAW which is important for MLA to the extent that a reference to extraditable offences should be reinterpreted to surrenderable offences (which also tones down the revolutionary character of abandoning double criminality as a refusal ground with respect to some investigative measures and clarifies that curing double criminality concerns in an MLA context also requires an intervention in either the 'mother documents' to which MLA provisions refer or the redrafting of the MLA provisions altogether). Second, there is the adoption of the FD Freezing and the FD EEW, which are applicable specifically with respect to search and seizure.

[197] This was required for the parts of offences that had been subject to approximation and was the additional will of the member states for (those parts of- offences beyond the approximation acquis.

First, as explained above, the concept of extraditable offences was significantly reshaped with the introduction of the FD EAW. The figure visualising the evolution of the concept in the European states is copied below.



DCR: double criminality requirement | A: threshold in abstracto | C: threshold in concreto | Y: years | M: months | IMS: Issuing member state

From the figure, it is clear that when the 2001 EU MLA Protocol refers to extraditable offences (e.g. with respect to controlled delivery, cross-border observation and cross-border hot pursuit) this meant at the time that these investigative measures would be subject to a double criminality test complemented with a sanction threshold set at 12 months for penalties in abstracto and 6 months for penalties in concreto.[198] However, the introduction of the FD EAW in the following year significantly reduced the scope of the double criminality requirement in that it lifted the possibility to call upon a double criminality issue for 32 listed offences provided that the offence is punishable with a maximum penalty of at least 3 years in the issuing member state.

[198] Art.2.1 CoE Extradition reinterpreted in light of Art.2.1 EU Extradition.

Recalling the replies to question 2.4.2. this position is supported by 73% of the member states despite the absence of a supporting legal framework.

Second, this list of offences is also included in Art.3.2. FD Freezing and Art. 14.2 FD EEW, as a result of which a search or seizure of a listed offence can no longer be made dependent on double criminality which means that – in light of the absence of clear definitions of the listed offences that will guarantee double criminality[199] – search and seizure should now be allowed for acts that do not constitute an offence in the executing member state. The evolutionary character of the limitation through the introduction of the 32 MR offence list to call upon the double criminality requirement as a ground for refusal specifically with respect to search or seizure, should be assessed taking account of the implications the evolution from extraditable to surrenderable offences brought about.

It was already explained that the possibility to refuse a request for search or seizure was *initially* linked to the concept of extraditable offences. However, the 1990 CISA cut the link between search and seizure on the one hand and extraditable offences on the other hand, because its Art. 50 stipulates that states may not make the admissibility of letters rogatory for search or seizure dependent on conditions other than a double criminality requirement (linked to a sanction threshold of 6 months in abstracto) and issues of consistency with the law of the requested member state. This means that the link with extraditable offences and the conditions related to sanction thresholds and offence types is no longer maintained for member states that participate to Schengen.

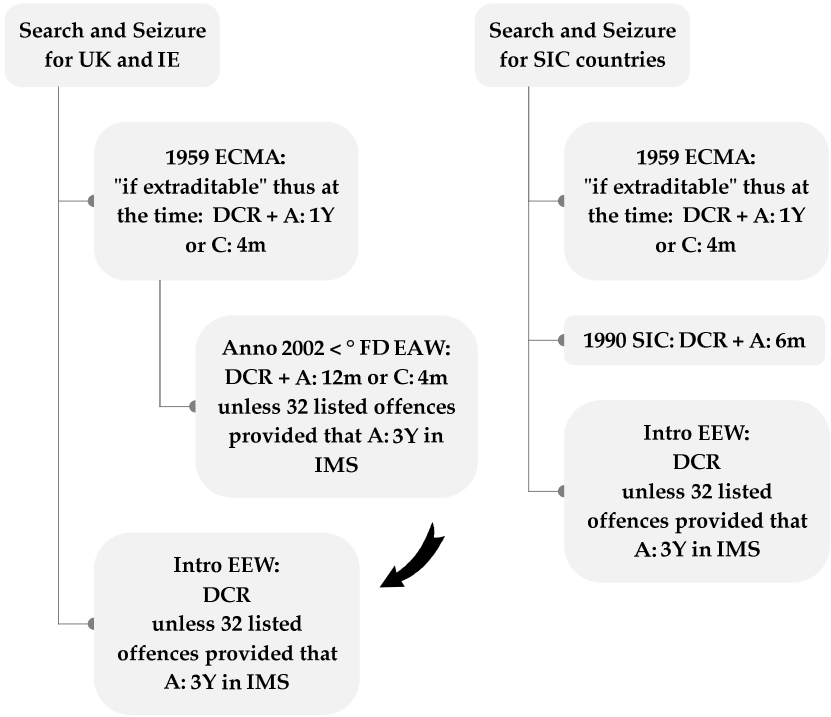
To the contrary, for member states that are not party to CISA, the link with extraditable offences remains and is as of 2002 – following the introduction of the FD EAW – could be reinterpreted as surrenderable offence. This would mean that e.g. for the UK and Ireland, search and seizure may be made dependent on double criminality requirements in accordance to the limits of the FD EAW. Ironically therefore, the UK and Ireland, traditionally two member states that are very reluctant with respect to the influences of European (criminal) law, where the first two member states that could no longer call upon the double criminality requirement for the 32 MR offences in the context of a request for search or seizure[200], whereas member states that fell within the scope of the CISA were still

[199] If the list of offences for which double criminality was abandoned was limited along the scope of the offences that are included in approximation instruments, the list would have – in its effect – not abandoned the double criminality *requirement* but would have abandoned the double criminality *test* with respect to the offences for which the double criminality requirement is known to be met.

[200] It should be stressed though that in reply to question 2.4.2. neither the UK nor Ireland were in favour of reinterpreting the concept of extraditable offence into surrenderable offence following the introduction of the FD EAW.

able to do so in accordance with Art. 50 CISA. This distinction between Schengen and non-Schengen member states was lifted with the introduction of the FD EEW, which, in analogy to the FD EAW limited the possibility to call upon the double criminality requirement along the 32 MR offence list.

The figure inserted visualises this reasoning.



DCR: double criminality requirement | A: threshold in abstracto | C: threshold in concreto | Y: years | M: months | IMS: Issuing member state

3.5 Drawing parallels for other investigative measures

From the perspective of the cooperating member states, analysis reveals that for the time being, not all investigative measures have an explicit legal basis in a cooperation instrument.[201] This means that for a number of investigative measures the legal texts do not provide an explicit and immediate answer to questions relating to the position of the double criminality requirement. Therefore it is important to try and complement the overview of explicitly regulated investigative measures – for which it is stipulated that double criminality requirements are accepted as an exception to the general rule to afford cooperation based on criminalisation in the requesting member state – with an overview of investigative measures for which the acceptability of double criminality inspired refusal grounds is uncertain.

First, interpreting the acceptability for member states to attach conditions to cooperation as the acceptability for member states to limit cooperation based on double criminality requirements, a set of investigative measures can be identified for which double criminality is most likely allowed as a limit to cooperation.[202]

The following investigative measures were identified in the context of the previous study as being – most likely – dependent on the double criminality requirement.

- Covert investigations (by officials) – this investigative measure is regulated in Art. 23, 3 Naples II and 14, 2-3 EU MLA Convention, stipulating respectively that both the conditions under which a covert investigation is allowed and under which it is carried out 'shall be determined by the requested authority in accordance with its national law', and that the decision on a request for assistance in the conduct of covert investigations is taken by the competent authorities of the requested member state 'with due regard to its national law and procedures', the covert investigations themselves having to 'take place in accordance with the national law and procedures' of the member state on the territory of which they take place;

[201] It is highly questionable whether it is desirable even feasible to introduce an explicit legal basis for any possible investigative measure. See more elaborately in VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? Antwerp-Apeldoorn-Portland, Maklu, 2010.

[202] VERMEULEN, G., DE BONDT, W. en VAN DAMME, Y., *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, in IRCP-series, 37, Antwerp-Apeldoorn-Portland, Maklu, 2010.

- Interception of telecommunications if the subject of the interception is present in the requested/executing member state and his or her communications can be intercepted in that member state, with immediate transmission – this investigative measure is regulated in Art. 18, 1, a) in conjunction with 18, 2, b) and 18, 5, b) EU MLA Convention, the latter paragraph stipulating that the requested member state shall undertake to comply with an interception request 'where the requested measure would be taken by it in a similar national case', being allowed to 'make its consent subject to any conditions which would have to be observed in a similar national case';
- Interception of telecommunications requiring the technical assistance of the requested member state (irrespective of whether the subject of the interception is present in the territory of the requesting, requested or a third member state), without transmission and without transcription of the recordings – this investigative measure is regulated in Art. 18, 1, b) in conjunction with 18, 2, a), b) or c) and 18, 6 EU MLA Convention, the latter paragraph stipulating that the requested member state shall undertake to comply with an interception request 'where the requested measure would be taken by it in a similar national case', being allowed to 'make its consent subject to any conditions which would have to be observed in a similar national case'; interception of telecommunications requiring the technical assistance of the requested member state (irrespective of whether the subject of the interception is present in the territory of the requesting, requested or a third member state), without transmission and with transcription of the recordings – this investigative measure is regulated in Art. 18, 1, b) in conjunction with 18, 2, a), b) or c), 18, 6 and 18, 7 EU MLA Convention, the latter two paragraphs stipulating that the requested member state shall undertake to comply with an interception request 'where the requested measure would be taken by it in a similar national case', being allowed to 'make its consent subject to any conditions which would have to be observed in a similar national case', and that it will consider the request for a transcription of the recording 'in accordance with its national law and procedures';
- Allowing an interception of telecommunications to be carried out or continued if the telecommunication address of the subject of the interception is being used on the territory of the requested/executing member state ('notified' member state) in case where no technical assistance from the latter is needed to carry out the interception – this investigative measure is regulated in Art. 20, 2 in conjunction with 20, 4, a) EU MLA Convention, the latter paragraph stipulating under i)-iv) that the notified member state 'may make its consent subject to any conditions which would have to be observed

in a similar national case', may require the interception not to be carried out or to be terminated 'where [it] would not be permissible pursuant to [its] national law', may in such cases require that any material already intercepted may not be used, or 'may only be used under conditions which it shall specify', or may require a short extension 'in order to carry out internal procedures under its national law';

- Collecting and examining cellular material and supplying the DNA profile obtained – this form of legal assistance is regulated in Art. 7 Prüm, stipulating under (3) that it can only be provided if, inter alia, 'under the requested contracting party's law, the requirements for collecting and examining cellular material and for supplying the DNA profile obtained are fulfilled';

Furthermore, there are also investigative measures for which it is expressly (and rightly) stipulated that no formalities whatsoever may be attached to them. This means that there is no way for member states to deviate from the general rule that mutual legal assistance must be afforded regardless of double criminality. Therefore, the following investigative measures were identified in the context of the previous study as being – most likely – not dependent on the double criminality requirement.

- Interception of telecommunications where the technical assistance of the requested/executing member state is needed to intercept the telecommunications of the subject of the interception (irrespective of whether the latter is present in the territory of the requesting/issuing member state or of a third member state) with immediate transmission – this investigative measure is regulated in Art. 18, 1, a) in conjunction with 18, 2, a) or c) and 18, 5, a) EU MLA Convention, the latter paragraph stipulating that 'the requested member state may allow the interception to proceed without further formality';

- Transfer of detainees from the requested/executing to the requesting/issuing member state (provided the requested/executing member state may make such transfer dependent on the consent of the person involved) – this investigative measure is regulated in Art. 11 ECMA, which does not allow for refusal of transfer referring to national law;

- Transfer of detainees from the requesting/issuing to the requested/executing member state (provided the requested/executing member state may make such transfer dependent on the consent of the person involved) – this investigative measure is regulated in Art. 9 EU MLA Convention, which neither foresees possible refusal of transfer referring to national law nor allows for entering reservations, to be read in conjunction with Art. 25 of the same Convention, according to which member states may not enter

reservations in respect of the Convention, other than those for which it makes express provision;

- Hearing under oath (of witnesses and experts) – this investigative measure is regulated in Art. 12 ECMA, prescribing mandatory compliance by the requested party with such request unless its law prohibits it;
- Hearing by videoconference – this investigative measure is regulated in Art. 10, 2 EU MLA Convention, pointing out that the requested member state shall agree to the hearing where this is not contrary to the fundamental principles of its law and on the condition that it has the technical means to carry out the hearing;
- Hearing by telephone conference (of witnesses or experts, only if these agree that the hearing takes place by that method) – this investigative measure is regulated in Art. 11, 3 EU MLA Convention, pointing out that the requested member state shall agree to the hearing where this is not contrary to fundamental principles of its law.

Considering that the abovementioned investigative measures are not coercive or intrusive in nature, it is consistent to agree that it is not justified to limit the possibility to cooperate based on a double criminality issue.

The measures listed above are explicitly regulated and can therefore be explicitly found in cooperation instruments. However, there are a lot of investigative measures for which no explicit regulation is foreseen. Cooperation for those kind of unregulated types of investigative measures has a legal basis in the general baseline that member states are to afford each other the widest measure of assistance.

Nevertheless, it remains interesting to review the unregulated measures to cluster them in those for which a double criminality requirement would be justified and those for which a double criminality requirement would not be justified. This exercise was conducted in the context of a previous research project[203] and resulted in the following overview:

A double criminality requirement will be justified for the following investigative measures:

- registration of incoming and outgoing telecommunication numbers
- interception of so-called direct communications
- obtaining communications data retained by providers of a publicly available electronic communications service or a public communications network

[203] VERMEULEN, G., DE BONDT, W. en VAN DAMME, Y., *EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence?*, in IRCP-series, 37, Antwerp-Apeldoorn-Portland, Maklu, 2010.

- withholding/intercepting of mail (and reading it)
- cooperation with regard to electronic communications (other than tele-communications) (registration of incoming and outgoing communications, interception etc)
- controlled delivery through the territory of the requested/executing member state (i.e. across its territory, the territory of destination of the delivery or where intervention is envisaged being another member state or a third state) The inclusion of this investigative measure in this cluster might not be self-explanatory, as it may seem that it is regulated in the EU MLA Convention. Unlike in the corresponding provision of the 1997 Naples II Convention, however, the provision relating to controlled deliveries in the EU MLA Convention doe not relate to transit controlled deliveries also, and is limited to controlled deliveries 'on' the territory of the requested member state.
- (cross-border) use of (police) informers and civilian infiltrators
- (cross-border) use of technical devices (camera, electronic/GPS tracking) for the purposes of observation
- entry of premises without consent in view of discrete visual control or search
- confidence buy (either or not including flash-roll)
- establishing front business
- (discrete) photo and video registration
- assistance in non-procedural protection of protected witnesses and their family members (direct and physical protection; placement of a detainee in a specialised and protected section of the prison; relocation for a short period;
- relocation for a longer or indefinite period; change of identity, including the concealment of certain personal data by the administrative authorities; lesser measures, techno-preventative in nature)
- carrying out bodily examinations or obtaining bodily material or biometric data directly from the body of any person, including the taking of fingerprints (other than collecting and examining cellular material and supplying the DNA profile obtained: supra)
- exhumation and transfer of the corpse
- (exhumation and) forensic anatomist investigation
- lie detection test (of a non-consenting witness or suspect)
- line-up (including of a suspect, not consenting to appear)

A double criminality requirement will not be justified for the following investigative measures:

- conducting analysis of existing objects, documents or data
- conducting interviews or taking statements (other than from persons present during the execution of a European Evidence Warrant (EEW) and directly related to the subject thereof, in which case the relevant rules of the executing state applicable to national cases shall also be applicable in respect of the taking of such statements) or initiating other types of hearings involving

suspects, witnesses, experts or any other party, other than under oath or by video or telephone conference (supra)
- reconstruction
- making of video or audio recordings of statements delivered in the requested/executing member state
- video conference hearing of accused persons
- video conference hearing of suspects

This exercise is of course important in light of the ongoing debates with respect to the European Investigation Order because that instrument has the ambition to replace the existing MLA framework and to expressly regulate a series of investigative measures.

3.6 Threat of the declaration

From the perspective of the EU in its capacity of a policy maker who seeks to ensure consistency and safeguard the approximation acquis, the possibility to issue a declaration to the offence list is an important novelty. What is new in the FD EEW compared to the FD EAW[204] and could offer relief to the double criminality concerns raised from a member state perspective, is the possibility to issue a declaration with respect to the double criminality aspects of Art.14.2 FD EEW. That possibility was introduced upon the request of – and solely with respect to – Germany out of concerns of being forced to cooperate in relation to cases that fail the double criminality test.[205] It is a striking illustration of the false presumption of criminalisation of the listed offences and the abandonment of the double criminality requirement. Germany had made the lack of clear and common definitions and the possibility of having obligations with regard to behaviour not criminalised under German legislation, one of their key issues during negotiations. The compromise reached is included in Art. 23 (4) EEW and allows Germany – and only Germany – a derogation from the provisions relating to double criminality in the FD EEW. The derogation is not applicable to the entire list of offences but allows Germany to make execution of an EEW

[204] The possibility to issue a declaration is new compared to the FD EAW, but was meanwhile also included in FD Deprivation of Liberty and FD Alternatives.

[205] See for more detail: NOHLEN, N. "Germany: The European Arrest Warrant Case." International Journal of Constitutional Law 2008, 6, p 153-161; POLLICINO, O. "European Arrest Warrant and the Constitutional Principles of the Member States: A Case law-based outline in the attempt to strike the right balance between interacting legal systems." German Law Journal 2008, 9, p 1313-1355; VERMEULEN, G. "Mutual recognition, harmonisation and fundamental (procedural) rights protection", in MARTIN, M., Crime, Rights and the EU. The future of police and judicial cooperation, London, JUSTICE - advancing access to justice, human rights and the rule of law, 2008, p 89-104.

subject to verification of double criminality in the case of the offences relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling. This German demarche would not have been necessary, if the abandonment of the double criminality test was limited to the approximation acquis (or at most in relation to the behaviour that is known to be commonly criminalised even beyond the minimum that is included in the approximation instruments). This becomes especially apparent when analysing the content of the German declaration. For terrorism, computer-related crimes and racism and xenophobia a reference is made to existing approximation instruments. Interestingly, the definitions of sabotage, racketeering and extortion and swindling are copied from the explanation the JHA Council had provided in 2002 recognising the concerns related to the lack of a harmonised definition.[206]

Undeniably however such an individual member state declaration opens the door to a full on return to nationally defined offences that may or may not be in line with the approximation acquis. Whereas the use of declarations can be perceived as the solution from a member state perspective, the reintroduction of the traditional double criminality requirement is an important setback for the EU policy maker to the extent that the national declaration would reintroduce a double criminality requirement also with respect to behaviour that has been subject to approximation for that would undermine the possibility for the European policy maker to reinforce its approximation obligations via the prohibition to test double criminality in relation to those approximated parts of offences. Even though the German declaration did not affect the effect of the approximation acquis, the unlimited possibility to issue a declaration in the first place was a bad choice. The European policy maker should have seen to it that a declaration affecting the approximation acquis was legally prohibited by allowing the declaration only with respect to the faith of double criminality verification in relation to offences beyond the approximation acquis.

3.7 Impact of capacity as a refusal ground

Additionally, it can be interesting for the EU policy maker to follow the debate on the use of capacity as a refusal ground. Capacity concerns increasingly gain attention, especially now cooperation is changing from request-based into order-based.

If member states link (and thus limit) the use of capacity concerns to situations in which double criminality is not fulfilled, this means that – in light

[206] See 2436th meeting of the Council (Justice and Home Affairs and Civil Protection) held in Luxembourg on 13 June 2002, JAI 138, CONS 33, 9958/02, ADD 1 REV 1.

of the line of argumentation developed with respect to the issuing of declarations – it can be important to stipulate that it is inacceptable to use double criminality as a refusal ground in relation to offences that have been subject to approximation. Hence, this means that cooperation for cases in relation to offences that have been subject to approximation can never be hindered by capacity concerns.

However, member states may also decide that it is acceptable to use capacity as a refusal ground even when double criminality is met, which means that also cases in relation to offences that have been subject to approximation can be hindered by capacity concerns. In this scenario it would be interesting for the European Union in its capacity of a policy maker to bring the acceptability of the *aut exequi aut tolerare* principle to the table.[207] This new principle would attach consequences to using capacity as a refusal grounds in relation to (all or some of the) offences that have been subject to approximation. For the issuing or requesting member state, this would entail a commitment to use its own capacity to complete the order or request; for the requested member state this would entail the obligation to accept the presence of and execution by another member state. If capacity is introduced as a refusal ground with respect to one or more investigative measures in the European investigation order, a discussion on the parallel introduction of *aut exequi, aut tolerare* can be considered.

3.8 Requirements for the formulation of national provisions

From the perspective of the person involved, the use of double criminality as a refusal ground can never be against her best interests. If cooperation is refused for double criminality reasons she will not be subject to the requested or ordered investigative measure. To the contrary, it is important to assess to what extent member states can offer their cooperation in absence of double criminality, which would constitute a breach in the double criminality shield.

As argued above, mutual legal assistance is an umbrella that covers a wide range of investigative measures amongst which there are measures that are intrusive or coercive in nature. Because of the diversity, some measures have been subject to specific regulations in the member states. Certain investigative measures are reserved for serious situations, that are defined either by a reference to (a selection of) offences or an indication of the sanction threshold.

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[207] A parallel is drawn from the existing *aut dedere aut iudicare* in extradition instruments. See also: BASSIOUNI, M. C. and WISE, E. M. Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law. Dordrecht, Martinus Nijhoff Publishers, 1995, 340p; VAN STEENBERGHE, R. "The Obligation to Extradite or Prosecute: Clarifying its Nature." Journal of International Criminal Justice 2011, 9 (5), p 1089-1116.

The question arises whether these specific provisions preclude the use of those investigative measures in absence of double criminality. The answer thereto is strongly dependent on the formulation of the national provision. If the national provision refers to the article numbers of the national criminal code to delineate the situation in which the use of the investigative measure is allowed, double criminality is indisputably a requirement. The investigative measure will only be possible in relation to behaviour that perfectly matches the behaviour described in the selected articles of the national criminal code. If however, the national provisions refer to either an offence label (without a reference to a specific article in the national criminal code) or a sanction threshold, it can be argued that the provision can be interpreted widely to also encompass situations where double criminality is not met. The question is then however, whether such wide interpretation is acceptable.

When looking into the case law of the European Court of Human Rights it is acknowledged that some investigative measures cannot be deployed for just any offence. More importantly, the court sets out rules with respect to the quality of the legal basis of those coercive and intrusive investigative measures. Qualitative law refers to *accessibility* and *foreseeability* of the law and the compatibility with the *rule of law*.[208] Whereas a simple reference to using the investigative techniques to "*fight serious offences*" is not specific enough and therefore fails to meet the quality criteria[209], it is made explicit that the criteria cannot mean that an individual must be able to have "*a limitative list of offences*".[210] The nature of the offences for which a specific investigative technique can be used must be laid down with "*reasonable precision*".[211] Though court's case law does not specifically deal with the double criminality issue and is therefore inconclusive on whether that reasonable precision can also extent beyond the national double criminality test, there are two cumulative reasons why it can be expected that the court would except an interpretation that includes cases beyond the national double criminality test in the scope of the provision regulating the use of the said investigative measure. First, the court has accepted as reasonably precise and thus sufficiently detailed, national provisions stipulating that investigative measures were possible with respect offences which could reasonably be expected to be sentenced to imprisonment for a term of three years or more.[212] Similarly, reference to offence labels and families is considered to be sufficiently detailed. Second, in the current EU philosophy it is not desirable that national

[208] ECtHR, Case of Weber and Saravia v. Germany, application no. 54934/00, 29 June 2006, §84.
[209] ECtHR, Case of Iordachi and Others V. Malta, application no. 25198/02, 10 February 2009, §44.
[210] ECtHR, Case of Kennedy v. The United Kingdom, application 26839/05, 18 May 2010, § 159.
[211] ECtHR, Case of Malone v. The United Kingdom, application 8691/79, 2 August 1984, §70.
[212] ECtHR, Case of Kennedy v. The United Kingdom, application 26839/05, 18 May 2010, § 34 *juncto* 159.

law is interpreted in a way that allows criminals to enjoy the comfort of safe havens. From that perspective much can be said for the argumentation that if a person commits an offence punishable with a sentence involving deprivation of liberty for at least three years in one member state and thereafter travels to a member state in which specific investigative techniques are possible for offences which could reasonably be expected to be sentenced to imprisonment for a term of three years or more, the person should know that investigative measures are possible for the acts he committed in the first member state, even if they are not considered criminal in the second. After all, the situation relates to offences of which the person involved cannot but reasonably expect that they can be sentenced to imprisonment for a term of three years or more.

To make the text of the national provision regulating the use of investigative measures even more clear on this point, it can be recommended to use a formulation that leaves no room for interpretation. The provision could e.g. read that an investigative measure can be used in situations where the acts could reasonably be expected to be sentenced to imprisonment for a term of three years or more, in any of the member states of the European Union.

4 Transfer of pre-trial supervision

Thirdly, the mechanism of transfer of pre-trial supervision is assessed. It will be argued – in addition to the conclusions deduced from the analysis of the position of double criminality in the previous cooperation domains – that (1) the introduction of the possibility to issue a declaration with respect to the 32 MR offence list with respect to some instruments whereas such option is not foreseen in other instruments runs the risk of undermining the order of preference that can be read into the objectives of the instruments and (2) the position of the person involved is very complex and could have been elaborated on more to avoid discussions.

4.1 Variation on the same theme: a partial double criminality limit

As spelt out in Art. 2.1. b FD Supervision, the very objective of the supervision consists of promoting non-custodial measures for persons who are not resident in the investigating or prosecuting member state. Two different scenario's can occur. First the person involved can be found in the member state of residence in which case the investigating or prosecuting member state seeks assistance from another member state in order to ensure that the person is supervised awaiting her trial; Second the person involved can be found in the

investigating or prosecuting member state which is seeking her transfer to the member state of residence, in which case the investigating or prosecuting member state seeks assistance from the member state of residence to supervise the person awaiting her trial in order to avoid that she is held in pre-trial detention.

The legal instrument makes transfer of pre-trial supervision (partially) dependent on the application of the double criminality requirement.[213] This requirement is included in Art. 14 FD Supervision. Similar to the design of the double criminality requirement in the other mutual recognition instruments, it is stipulated that the listed offences cannot be subject to a double criminality verification if they are punishable in the issuing state by a custodial sentence or a measure involving deprivation of liberty for a maximum period of at least three years, and as they are defined by the law of the issuing member state. For offences other than those listed, the executing member state may make the recognition of the decision on supervision measures subject to the condition that the decision relates to acts which also constitute an offence under the law of the executing member state.

Different from the other mutual recognition instruments, the double criminality requirement is not linked to sanction thresholds to be met in the issuing nor executing member state. When comparing the provisions of the FD Supervision to the FD EAW the difference is apparent. Art.2.1 FD EAW reads that [...] *A European arrest warrant may be issued for acts punishable by the law of the issuing member state by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months*. Thereafter the article continues with the explanation that a list of offences is introduced for which double criminality cannot be tested as soon as the act is punishable in the issuing member state with a detention order for a maximum period of at least three years. The abovementioned scope limitation included in Art. 21.1 FD EAW is not included in the FD Supervision. Art. 14 FD Supervision on the double criminality requirement immediately refers to the listed offences. Because there is no reason to limit the access to supervision in the home state[214] (to avoid pre-trial supervision in the investigating or prosecuting member state) should not be limited according to the severity of the offence (because especially for minor

[213] Pre-trial supervision was unregulated prior to the adoption of the framework decision. The type of supervision referred to in the Council of Europe convention on the international validity of criminal judgements relates to supervision as a conditional sentence whereas the type of supervision dealt with underneath this heading is not a sentence.

[214] Following Art. 9.1. FD Supervison, the home state should be interpreted as the member state in which the person is lawfully and ordinarily residing.

offences pre-trial detention may be disproportionate), it makes sense not to include sanction thresholds to limit cooperation possibilities.

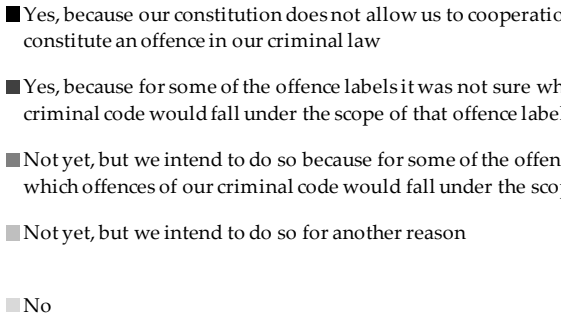
Finally, here too execution of the orders can have a significant impact on the capacity of the executing member state, depending on the type of supervision measure and the number of persons a member state must supervise at any given time. Therefore, member states can have a good reason to uphold a (partial) double criminality requirement in relation to the transfer of pre-trial supervision orders. Should the member states decide that – in the future – the practical experience with this instrument points to serious capacity issues and therefore it should be considered to include capacity as an additional refusal ground, the argumentation developed above applies mutatis mutandis, meaning that the EU as a policy maker should try and safeguard the approximation acquis from cooperation limits following the use of capacity as a refusal ground.

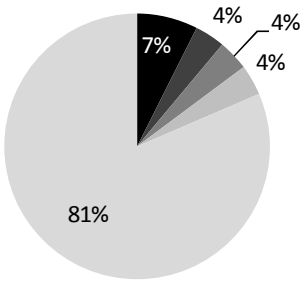
4.2 Threat of the declarations

The member states' concerns raised with respect to having to cooperate in relation to behaviour that would not constitute an offence if committed in their territory and the exception granted to Germany in relation thereto in the FD EEW, lead to the introduction of the general possibility for all member states to issue a declaration with respect to the provisions regulating the double criminality limits to pre-trial supervision. Therefore the threat of this possibility foreseen in the FD Supervision is larger than the threat of the possibility foreseen in the FD EEW because there it relates to all member states.

Because FD Supervision is a relatively young instrument and the implementation deadline does not pass until 1 December 2012, no final picture can be drawn with respect to the impact of the declarations. Nevertheless, the questionnaire included a question with respect to the intention of member states to issue a declaration. In reply to question 2.2.2 only 11% of the member states indicated that they have issued a such declaration, and another 8% have indicated that they are planning to do so in the coming months.

2.2.2 Have you issued a declaration setting out the guidelines for the interpretation of the 32 MR offence list (cfr. Art 14.4 FD Supervision)?





Even though 81% of the member states does not intent to issue a declaration and therefore the threat for the EU policy maker of the possibility created in Art. 23.4 FD EEW is not likely to be significant, this does not mean that from a policy perspective this was the best approach. The EU policy maker should not have introduced the unlimited possibility for member states to issue a declaration and decide individually on the scope of the abandonment of the double criminality requirement. The declarations issued by the member states should only be allowed to relate to the acceptability of the abandonment of the double criminality requirement beyond the approximation acquis, "*existing at any time*". The latter nuance is important to ensure that declarations can stand the test of time. It indicates that declarations must always be read in light of (and will be

overruled by) the existing approximation acquis. Only in doing so the progress made through approximation can be safeguarded.[215]

It must be observed that the currently existing approximation acquis does not match the 32 MR offence list. No approximation instrument exists for each of the 32 offence labels. Therefore, the question arises what to do with the *excess* offences.[216] Two options can be considered. Either, the declaration would limit the scope of the offence list to match the current approximation acquis, or the scope of the current approximation acquis should be further elaborated on to match the offences that are currently included in the offence list.

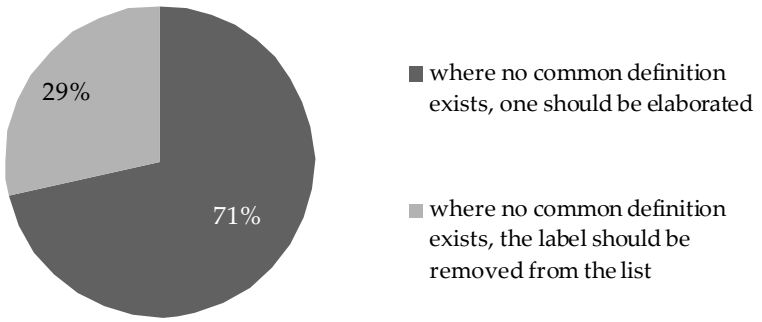
Even though the ad hoc and semi-ad random compilation of the list is highly criticized[217] and it is not advisable to use the list as a basis to decide for which offences the EU criminal policy should be further developed (encompassing also approximation efforts), the replies to question 2.2.5. reveal that 71% of the member states are inclined to retain the content of the current offence list and use it to support the argumentation that *where no common definition exists, one should be elaborated.*

[215] Because it is to be expected that a member state either accepts the partial abandonment of the double criminality requirement based on the 32 offence list or rejects the abandonment of the double criminality requirement and issues a declaration, it would have altogether been more easy to allow a member state to issue a declaration stipulating that double criminality testing will only be abandoned to the extent that approximation obligations exist. In doing so, mutual trust consists of trusting that the other member state has correctly labelled the underlying behaviour as a type of behaviour that falls within the scope of the approximation acquis.

[216] For the 32 listed offences, 16 have been subject to approximation (including the *crimes within the jurisdiction of the International Criminal Court*) and 16 have not received any kind of internationally agreed definition.

[217] See e.g. PEERS, S. "Mutual recognition and criminal law in the European Union: Has the Council got it wrong?" Common Market Law Review 2004, 41, p 35-36.

2.2.5 Would it be an acceptable future policy option to clearly define the scope of the 32 MR offence list with common definitions?



For the offence labels that are included both in the 32 MR offence list as well as in the list in Art. 83(1) TFEU, definitions can be further developed, with a two-thirds majority. However, for each of those offence labels an approximation instrument already exists. Technically, it can be considered whether it is appropriate to interpret the offence lables in a broad fashion so that they encompass more of the lables in the 32 offence list.[218] Though not advisable, the replies to question 2.2.5 indicate that the necessary two-thirds majority can be reached. Technically, to the extent that the excess offences in the 32 MR offence list match the offences included in Art. 83(1) TFEU, an approximation instrument can be adopted. Additionally, to the extent that the excess offence is not included therein, but meets the requirement for it to fall within the approximation competence (i.e. that it is a serious offence with a cross-border dimension), the Council can identify it as another area of crime for which approximation is desirable. Finally however, some of those excess offences will not meet the approximation requirement and cannot be subject to approximation. In this scenario, though technically *approximation* is not possible, nothing should prevent the existing *common criminalisation acquis* from being identified to scope the redundance of the double criminality verification.

[218] It is not unimaginable that the broad *organised crime* label included in Art. 83(1)2 is used to approximate e.g. the *organised and armed robbery* label included in the 32 MR offence list.

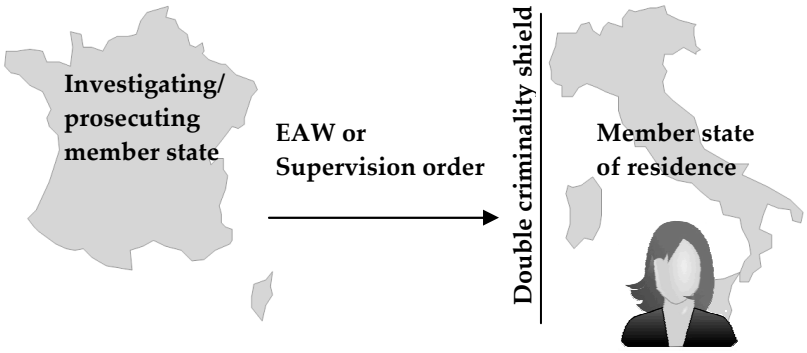
The replies to question 2.2.5. suggest that the necessary unanimity will not be reached, which means that declarations limiting the scope of the abandonment of the double criminality requirement to match the approximation acquis will always have as an effect that the list of offence labels for which double criminality is abandonned is significantly reduced.

4.3 Possible perverse effect of double criminality as a refusal ground

From the perspective of the person involved, it be noted that – different than in the previous cooperation contexts – the use of double criminality in a supervision context can run counter her interests. As explained above, two scenarios can be distinguished.

4.3.1 Person involved is in the member state of nationality or residence

In this first scenario, the member state in which proceedings will take place might already in the investigating phase want to ensure that the person involved will be present at her trial. When that person is found outside its territory, a member state has two options: either an EAW can be sent seeking the immediate surrender of the person or a supervision order can be sent seeking the assistance of another member state to supervise the person involved awaiting a 'just-in-time' surrender with a view to being present at her trial.



Because it is likely that – as a result of an immediate surrender – the person involved will end up in pre-trial detention in the prosecuting member state, member states have adopted a legal instrument that allows the issuing of a

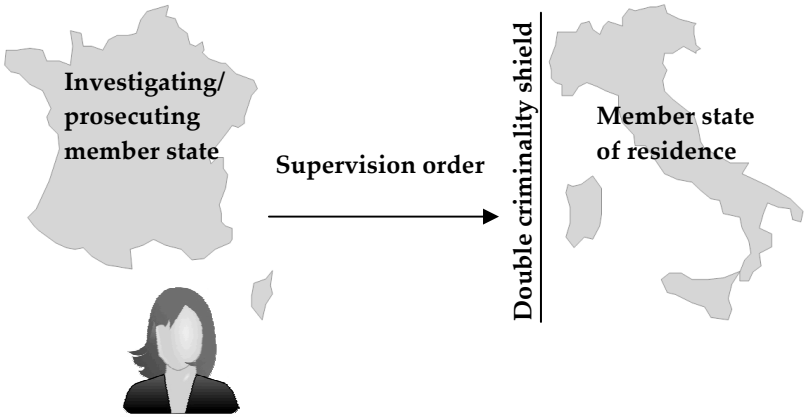
supervision order to seek assistance from the member state of residence where the person was found. If in this scenario a double criminality issue would rise and the member state of the person's residence would refuse cooperation, the double criminality requirement would shield the person involved from a measure being taken. However, because the double criminality shield applicable to the supervision order may differ from the double criminality shield applicable to the EAW, following a future member state declaration pursuant to Art. 14.4. FD Supervision, this decision is not necessarily in the best interest of the person involved. Seeking recourse to an EAW upon refused supervision may be successful for the prosecuting member state, depending on the nature of the double criminality issue underlying the refused supervision.

If the double criminality issue is not related to any of the listed offences, the refusal ground will remain valid with respect to the EAW and will be able to shield the person involved from any measure being enforced against her.

If however the double criminality issue is related to any of the listed offences read in combination with a declaration of the member state of residence stating that even for the listed offences double criminality is required, this declaration will not be valid in a surrender context which means that refusal of an EAW would not be possible. This means that refusing to cooperate following the supervision order will have as an effect that the person involved will not be subject to a supervision measure in her member state of residence, but will have to be surrendered to the prosecuting member state following an EAW, where she will probably be subject to a pre-trial detention. In this situation it is clear that calling upon a double criminality requirement to enforce a supervision order is not always in the best interest of the person involved, not even when she is located on the territory of the executing member state. Furthermore, it illustrates the consequences of the introduction of the possibility to issue a declaration with respect to the double criminality requirement only with respect to some of the cooperation instruments. It will result in a landscape in which double criminality verification is not consistently abandoned throughout the legal framework in that it interferes with the intended order of preference between the different legal instruments.

4.3.2 Person involved is in the investigating or prosecuting member state

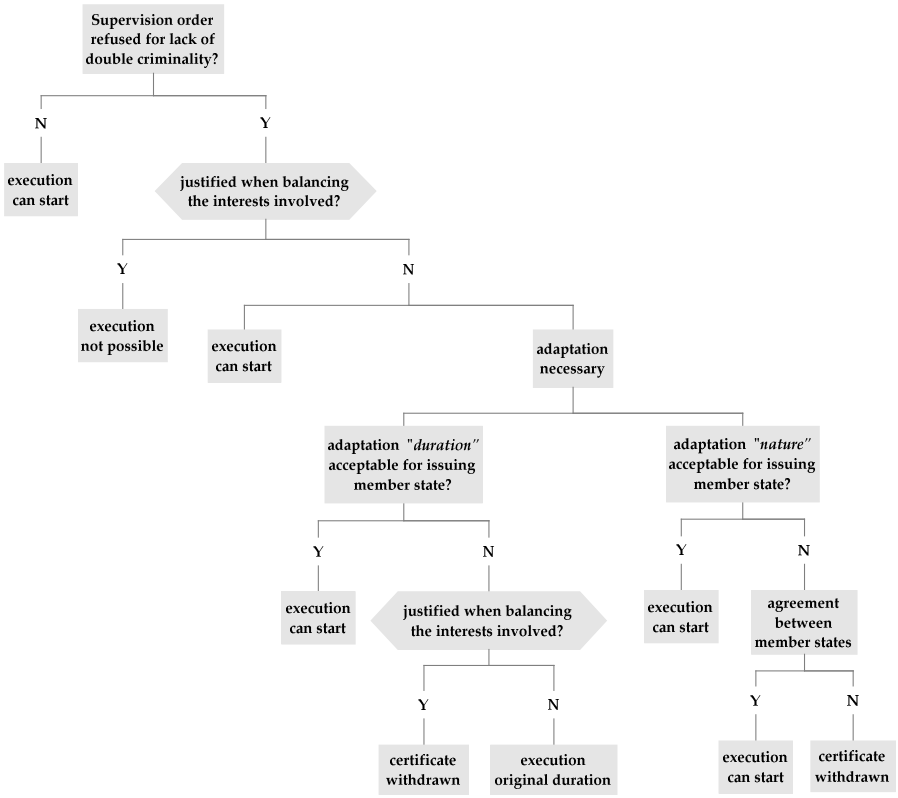
In this second scenario, the investigating or prosecuting member state will seek cooperation from the member state of nationality or residence to supervise the person involved pending her trial, in order to avoid a pre-trial detention.



If the member state of residence refuses cooperation based on a double criminality issue[219] it is clear that the person involved will be deprived from the possibility to enjoy a supervision measure in her member state of residence as opposed to likely pre-trial detention in the investigating or prosecuting member state. Here too it is clear that seeking recourse to double criminality as a limit to cooperation will clearly not always be in the best interest of the person involved. Therefore, it could be considered to look into ways to balance the interests of the person involved and the member state of residence and into the feasibility of introducing a mandatory dialogue either or not followed legal remedy against the use of double criminality as a refusal ground. Though a person involved should not have the right to choose the location of execution, a dialogue between the parties involved should not be ruled out, for some member states may be willing to execute in spite of lack of double criminality. A more far-reaching option would make the member state's decision subject to a judicial review. The following paragraphs will elaborate on the decision making scheme inserted

[219] Either with respect to any of the 32 MR offences for which a declaration has been issued or with respect to any other offence.

below.[220] The hexagonal shapes point to moments where dialogue can take place either or not followed by a judicial review.



4.3.3 *Balancing the interest of the member state and the interest of the person involved*

It is legitimate for a member state to be opposed to executing supervision measures in relation to behaviour that is not considered to be an offence when committed on its territory. Execution of such supervision measures runs the risk of creating inconsistencies and disrupting the balance in the national criminal policy. However, it is important to balance that interest of the member state with the interest of the person involved. In light thereof it is recommended to

[220] The scheme starts from the assumption that double criminality is the only refusal ground. Obviously there are various other ground that can lead to refusal, but for the purpose of this line of argumentation, double criminality is the only refusal ground taken into account.

consider the introduction of a number of safeguards in the form of dialogues and possible judicial reviews.

Whenever the execution of a supervision order is *refused based on a double criminality concern*, the person involved might be given the right to enter into a dialogue with the member state and present her argumentations in favour of execution in her member state of residence. When the member state of residence upholds double criminality as a refusal ground, the person involved might be given the right to start a procedure in front of a judge in the refusing member state to seek an exception to the use of that refusal ground.[221] In a such scenario, the person involved will have the opportunity to elaborate on her arguments in favour of execution of the supervision order in spite of lacking double criminality. The member state in its turn will have the opportunity to convince the judge of the reasons why execution would disproportionately disrupt the balance of and consistency within the national criminal justice system. Ultimately it will be a judge who will rule on the conflicting interests. If the judge decides that the refusal ground is justified when balancing the interests involved, execution in the member state of residence is not possible. If the person involved successfully challenged the used of double criminality as a refusal ground, the member state of nationality or residence might be obliged to initiate the execution of the supervision order.

4.3.4 Ensuring an acceptable execution

Execution in a situation where there is a lack of double criminality is far from evident and will inevitably cause problems. Following the standard procedure foreseen in the FD Supervision, the executing member state may adapt either the duration or the nature of the supervision order to ensure compatibility with its national law. Because of the lack of detail in the adaptation provisions, it is technically possible following lack of double criminality to 'adapt' the duration of the measure to nothing, or to drastically change the nature of the supervision measure in a way that supervision loses its added value. In both scenarios it is possible that the issuing member state deems the adaptation inacceptable and withdraws the certificate ordering the supervision.

In the event such a withdrawal is solely linked to the adaptation of the *duration* of the supervision measure, the person involved might again have the right to present her argumentation firstly in a dialogue with the executing member state and secondly, if that fails to be successful, also to a judge with a

[221] In the above described first scenario this could be to anticipate an EAW, but the possibility for judicial review will most likely be used more frequent in the second scenario, in which the person involved is situated on the territory of the investigating/prosecuting member state.

view to waiving *her right*[222] to a reduced duration and seeking to have the supervision executed as foreseen in the original order. Completely similar to the review procedure described above, the member state will have the possibility to convince the judge of the reasons why execution of the original duration would disproportionately disrupt the balance of and consistency within the national criminal justice system. Ultimately it will be a judge who will rule on the conflicting interests. If the person involved successfully challenged the adaptation of the duration of the supervision measure, the member state of nationality or residence will have to execute of the supervision measure as originally foreseen. If the person involved is not successful, the adaptation of the duration will stand and the certificate will most likely be withdrawn.

In the event such a withdrawal is solely linked to the adaptation of the *nature* of the supervision measure, the situation is more complicated. Obviously, it is impossible to require the member state of nationality or residence to execute a type of measure that is unknown in the national criminal justice system. In this type of situations a dialogue could be considered with the issuing member state as to which type of supervision measure described in the national criminal justice system of the executing member state would be acceptable.

From the above argumentation it is clear that balancing the double criminality related interests of the executing member state with the interests of the persons concerned is very complex and could have been elaborated on more in the current legislative instruments. A thorough debate is required in which due account is given to the feasibility of strengthening the position of the person involved. At least member states should consider not to introduce double criminality as a mandatory refusal ground, but to include it as an optional refusal ground to allow execution in absence of double criminality.

[222] The wording of the adaptation provisions do not provide the person involved with a right to have the measure adapted. The provisions are drafted from the perspective of the executing member state and *allow* for an adaptation as soon as the measure is incompatible with the law of the executing member state, either with respect to the nature or the duration of the measure. However, in a previous study on the FD Deprivation of Liberty, a general concern was raised with respect to the formulation of these adaptation provisions. It is felt that a strict lex mitior should apply, meaning that measures need to be automatically adopted, leaving the executing member state no discretionary power. See G. Vermeulen, A. van Kalmthout, N. Paterson, M. Knapen, P. Verbeke and W. De Bondt, "Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures", Antwerp-Apeldoorn-Portland, Maklu, 2011, 310, p 96.

5 Relocation and protection of witnesses

Fourthly, relocation and protection of witnesses is analysed, which entails both a execution component (e.g. executing protective measures such as organising a new identity or physical protection for a witness) and a mutual recognition component (i.e. recognising the immunity from prosecution granted to a collaborator with justice). It will be argued that double criminality can play role in the execution of protection measures and in the recognition of granted benefits.

5.1 Execution of protective measures

First, when the relocation and protection of witnesses is related to granting the protection that is included in a cooperation request of another member state, discussions with respect to the position of double criminality are parallel to the discussions held in relation to awarding each other mutual legal assistance.[223] As a baseline, no double criminality requirement is introduced in a mutual legal assistances sphere, though it has been observed that member states tend to hold on to a double criminality requirement with respect to either intrusive or coercive investigative measures or with respect to investigative measures that have a significant impact on the capacity of the requested member state. In relation to relocation and protection of witnesses, not so much the character of the investigative measure as opposed to the capacity implications will give rise to the introduction of double criminality as a refusal ground.

If capacity concerns lead to the introduction of a double criminality based refusal ground, this refusal ground will have no impact on the offences that have been subject to approximation, provided that it is clearly stipulated that no double criminality issues are accepted with respect to cases for which the underlying behaviour has been subject to approximation. If however, the member states decide to allow the use of capacity as a refusal ground even where double criminality is met, a discussion can be opened with respect to the acceptability of using that refusal ground in relation of (all or some) offences that have been subject to approximation.

[223] Relocation and protection of witnessess is currently not regulated which means that it is open for discussion to introduce either a request-based (MLA) or an order-based (MR) instrument. Besides the fact that it is very unlikely that member states will be willing to make this form of cooperation subject to the more stringent MR regime, the objective here is to look into the position of the double criminality requirement, regardless of the choice for an MLA or MR type of cooperation. See more detailedly in the chapter on stringency in international cooperation in criminal matters.

Furthermore, the question arises what the position of the person involved should be. When elaborating on the transfer of pre-trial supervision, it was argued that it can be considered to allow the person involved to enter into a dialogue with her member state of residence with a view to execution in that member state, in spite of double criminality concerns. In the event the dialogue does not have the desired result, it can even be considered to allow the person involved a judicial review in front of a judge in the member state of residence. In that scenario, there is a clear link between the person and the member state involved through the residence criterion. Here, in the context of relocation and protection of witnesses, the situation is more complex, because at least in a relocation scenario, the requested member state will not be the member state of residence. Therefore, the line of argumentation developed in the context of transfer of pre-trial supervision, cannot be transferred automatically to relocation and protection of witnesses without further consideration.

To the extent that a person has been granted a protection measure in a member state other than the member state of residence and execution in the member state of residence can be meaningful, a scenario such as the one developed in the context of transfer of pre-trial supervision can be considered. Just like it can be argued that a person should have the opportunity to enter into a dialogue with a member state with a view to seeking execution of pre-trial supervision in her member state of residence, it makes sense to allow a person to try and convince her member state of residence to execute the protection measure, in absence of double criminality even in spite of a capacity burden. In a more far-reaching scenario it can be considered to allow the person involved to subject the outcome of that dialogue to a judicial review in front of a judge in the requested member state.

If however, execution of the protection measure is only effective outside the member state of residence, the possibility to enter into a dialogue and possibly submit the outcome thereof to a judicial review is far less evident.

5.2 Recognition of granted benefits

Second, protection of witnesses can also refer to the situation where a person has been granted the status of collaborator with justice and therefore enjoys the benefit of immunity from prosecution. Though not all member states have a legal framework for this status, it is most commonly used for persons that have a history in participating in a criminal organisation and have decided to collaborate with justice in return for immunity from prosecution for their crimes. Obviously, mutual recognition of the status of collaborator with justice is essential for its success. The status of collaborator with justice and the immunity from prosecution that comes along with it, loses a lot (if not all) of its persuasive

strength if it is not recognised throughout the EU. In other words, if the status of a collaborator with justice is not mutually recognised by all member states, the value thereof is significantly eroded. The question arise how to ensure the acceptability of a mutual recognition requirement. Even though the concept of a *collaborator with justice* is not included in the criminal justice systems of all the member states, analysis did reveal that already in the current instrumentarium[224] traces can be found of the possibility to reduce the sentence. Art. 6 FD Terrorism stipulates that member states ought to take the necessary measures to ensure that penalties may be reduced if the offender provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain.

Taking account of the feedback received with respect to the future of the 32 MR offence list[225], it can be considered to introduce an obligation to mutually recognise immunities from prosecution granted to persons providing the authorities with information that could not have been otherwise obtained, with respect to the EU's priority offences. Formalising the status of collaborator with justice could be part of the EU's policy with respect to the approximated offences for which it has been agreed that European cooperation need to be stepped up. Introducing the status of collaborator with justice in relation to those offences could have a significant impact on the information that is available for prosecutorial services and in doing so would be beneficial for the effective fight against these offence types, which is the ultimate goal of the development of an EU policy for those offences in the first place.

Should the member states feel that this obligation is too far reaching to begin with, the possibility could be considered to introduce an intervention by Eurojust in the sense that it could advise member states prior to granting the status of collaborator with justice and the immunity from prosecution linked thereto. In this scenario, mutual recognition could be limited to cases that received a positive Eurojust advice.

In parallel thereto, it could also be looked into whether a set of minimum rules with respect to granting immunity from prosecution should be introduced. These minimum rules would in turn also limit the obligation for member states

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[224] VERMEULEN, G. EU standards in witness protection and collaboration with justice. Antwerp-Apeldoorn, Maklu, 2005, 280p.

[225] In the context of a previous study, member states had indicated to be open to a discussion that aims at lifting the possibility to call upon refusal grounds with respect to a limited set of offence labels, provided that they are clearly defined. See VERMEULEN, G., DE BONDT, W. and VAN DAMME, Y. EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? Antwerp-Apeldoorn-Portland, Maklu, 2010.

to mutually recognise the decision to grant a person the status of collaborator with justice.

Even though nothing has been explicitly regulated with respect to the relocation and protection of witnesses, the considerations above illustrate that here too the double criminality requirement comes into play and the approximation acquis can possibly be used to limit the scope of a mutual recognition obligation.

6 Transfer of prosecution

Fifthly, transfer of prosecution is analysed. Within this domain two entirely different situations can be distinguished. First, a transfer of prosecution can take place between two member states that were originally competent to initiate proceedings. In those cases, transfer of prosecution is characterised as a form of legal assistance between member states that have decided amongst them which of them is going to initiate proceedings.[226] Obviously, this would mean that no double criminality concerns can ever exist because a member state can never be competent to initiate a proceeding for behaviour that does not constitute an offence in its national legal order. Second, transfer of prosecution can take place from a member state that is originally competent to a member state that has no original competence. It is in this second context that the double criminality requirement comes into play.[227] It will be argued that it is only logical to introduce a double criminality requirement, though an exception thereto can be found in the Benelux treaty.

Considering the impact of a transfer of prosecution both for the person involved as well as for the requested member state, it is only logical that this technique would be limited along the double criminality requirement. Art. 7 CoE Transfer Proceedings justly stipulates that proceedings may not be accepted by the requested state unless the offence in respect of which the proceedings are requested would be an offence if committed in its territory and when, under these circumstances, the offender would be liable to sanction under its own law also. The corresponding EU instrument is still in a draft phase. The latest version

[226] Previous studies have looked into the criteria that can and cannot support the search for the best place for prosecution. See e.g.: VANDER BEKEN T. , VERMEULEN G , STEVERLYNCK S. and THOMAES S., Finding the best place for prosecution, Antwerp-Apeldoorn, Maklu, 2002, p. 118.

[227] This explains why in literature often only this second situation is described. See e.g. PLACHTA, M. "The role of double criminality in international cooperation in penal matters", in JAREBORG, N., Double Criminality, Uppsala, Iustus Förlag, 1989, p 84-134.

dates from November 2009[228] and maintains the double criminality requirement. Art.11.1 of the Draft stipulates that *'a request for transfer of proceedings shall not be accepted if the act underlying the request for transfer does not constitute an offence under the law of the member state of the receiving authority'*.

Consistent EU policy making[229] requires that a specific provision is included stipulating that it is inacceptable to use double criminality as a refusal ground in relation to cases for which the underlying behaviour has been subject to approximation. Member states that have correctly implemented the approximation instruments will have no double criminality issues in relation to those offences; member states that have not (yet) (correctly) implemented the criminalisation obligations included in approximation instruments cannot use their lagging behind as a justification to seek recourse to double criminality as a refusal ground. Interestingly, the abandonment of the double criminality verification based on a list of offences can be found in the old Benelux convention on the transfer of criminal proceedings.[230] Its Art.2.1 states that facts can only be prosecuted in another state if the double criminality requirement is met, or if it is one of the facts included in the list annexed to the convention.[231] The annex consists of a conversion table providing the offence label and the corresponding criminalisation provisions in each of the three cooperating member states. It could be recommended to mirror this approach in the EU instrument on transfer of prosecution, with respect to the offences that have been subject to approximation.

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[228] Council of the European Union, Draft […] on the transfer of proceedings in criminal matters, COPEN 231, 16437/09 REV 1 of 24.11.2009.

[229] In this section on the transfer of prosecution only the perspective of the EU in its capacity of a policy maker safeguarding its approximation acquis is dealt with. The perspective of the person involved is not dealt with because a dialogue-construction as elaborated on in the sections on transfer of pre-trial supervision and relocation and protection of witnessess (and *supra* also in relation to transfer of execution of sentences) to do away with the use of double criminality as a refusal ground by any of the member states is not opportune, not even with respect to the member state of nationality and/or residence.

[230] Traité entre le Royaume de Belgique, le Grand-Duché de Luxembourg et le Royaume des Pays-Bas sur la transmission des poursuites, 11 May 1974, Benelux Official Journal, Tome 4-III. Even though it is yet to enter into force, this convention is worth mentioning considering the ideas underlying the content of its annex.

[231] Original text: la personne qui a commis un fait […] ne peut être poursuivie dans un autre état contractant que si, selon la loi pénale de cet état, une peine ou mesure peut lui être appliquée pour se fait ou pour le fait correspondant mentionné sur la liste annexée au présent traité.

7 International validity and effect of decisions

Sixthly, the international validity and effect of decisions is analysed. This category comprises two subcategories, first cross-border execution and second cross-border effect of prior convictions in the context of a new (criminal) proceeding. It will be argued – in addition to the comments made with respect to the previous domains – that (1) with respect to the cross-border execution of convictions, the position of the person involved is complex and has not been sufficiently dealt with when drawing up the cooperation instruments and (2) with respect to the cross-border effect of convictions the position of the double criminality requirement has not been dealt with thoroughly and follow-up research is necessary.

7.1 Cross-border execution of convictions

7.1.1 Double criminality limits & the approximation acquis

Cross-border execution of convictions entails taking over an significant part of the criminal procedure as a result of which it is traditionally linked to the double criminality requirement.[232] Art. 4 CoE Conditional Sentence stipulates that the offence on which any supervision request is based shall be one punishable under the legislation of both the requesting and the requested state. Art.40.1 (b) CoE Validity refers back to Art. 4 that stipulates that a sanction shall not be enforced by another contracting state unless under its law the act for which the sanction was imposed would be an offence if committed on its territory and the person on whom the sanction was imposed liable to punishment if she had committed the act there. Similarly Art.3.1. e CoE Transfer Prisoners stipulates that a sentenced person may be transferred only if the acts or omissions on account of which the sentence has been imposed, constitute a criminal offence according to the law of the administering state or would constitute a criminal offence if committed on its territory. Finally, Art. 18(1)f CoE Confiscation of proceeds of crime stipulates that *"the offence to which the request relates would not be an offence under the law of the requested party if committed within its jurisdiction. However, this ground for refusal applies to cooperation only in so far as the assistance sought involves coercive action"*.

[232] This link was also expressed in the resolution on the IXth International Congress on Penal Law, stating that […] la reconnaissance de la sentence étrangère exige en règle générale la double incrimination in concreto de l'infraction donnant lieu à la sentence. See DE LA CUESTA, J. L. Résolutions des congrès de l'Association International de Droit Pénal (1926 – 2004). Toulouse, Éditions érès, 2009, 232p.

The current EU instruments are adopted in the mutual recognition philosophy and partially abandon the double criminality requirement for a list of offences. Cross-border execution of convictions is currently governed by four mutual recognition instruments with respect to (1) financial penalties, (2) confiscations, (3) sentences involving deprivation of liberty and (4) probation measures and alternative sanctions.

Though above reference was always made to a list of 32 MR offences for which the double criminality requirement is abandoned, there is one instrument that includes a more extended list of offences. Art. 5 FD financial penalties holds a list of 39 offences, adding to the list found in the other MR instruments (1) conduct which infringes road traffic regulations, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods, (2) smuggling of goods, (3) infringements of intellectual property rights, (4) threats and acts of violence against persons, including violence during sport events, (5) criminal damage, (6) theft and (7) offences established by the issuing state and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty. Ultimately it is up to the member states to decide for which offences they see it fit and acceptable to abandon the double criminality requirement.

Taking account of the commitments made when developing the approximation acquis, consistency in EU policy making requires that it is seen to that the member states do not accept the possibility to use double criminality as a refusal ground in relation to offences that have been subject to approximation. In parallel to the comments made with respect to the other instruments that include a list of offences for which double criminality is abandoned, it can be argued that – even though the current approximation acquis is covered by the 32(39) MR Offences, this approach does not guarantee that this will remain to be the case in the future. Considering the rapidly changing nature of the approximation acquis it would have been better to expressly include a provision that precludes the use of double criminality as a refusal ground with respect to offences that have been subject to approximation at any given time, complementing that provision with the compilation of a EULOCS like instrument that is accessible for anyone to consult and brings together the existing approximation acquis. Furthermore, the comments with respect to the possibility to issue a declaration with respect to the abandonment of the double criminality requirement are mutatis mutandis also valid with respect to the instruments regulating the cross-border execution of convictions. Though not all instruments governing the cross-border execution of convictions include a provision that allows member states to issue a declaration, the inclusion thereof in Art. 7 §4 FD Deprivation of Liberty and Art. 10 §4 FD Alternatives constitute a

threat for the approximation acquis to the extent that it is allowed to declare that double criminality will be tested in relation to cases of which the underlying behaviour has been subject to approximation. Therefore consistency requires that it is stipulated that member states are only allowed to issue a declaration with respect to the abandonment of the double criminality requirement beyond the existing approximation acquis at any given time. The further development of the approximation acquis will always overrule the content of a member state's declaration. It can only be hoped for that the upcoming instrument on disqualifications amends the provision governing the possibility to issue a declaration accordingly. [233]

7.1.2 Position of the persons involved

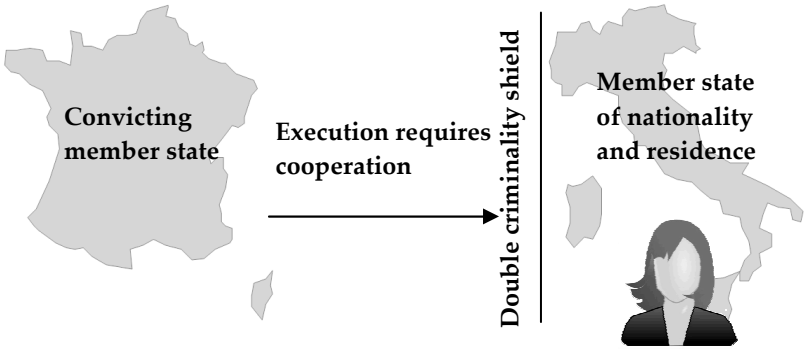
Similar to the discussion in the context of pre-trial supervision orders, the interests of the persons concerned can conflict with the interests of the executing member state. To further elaborate on that complexity, again a distinction needs to be made between the situation in which – without cooperation – no execution can take place altogether because the person involved is not in the convicting member state and the situation in which – without cooperation – execution would take place in another member state, because the person involved is in the convicting member state.

Person involved is not in the convicting member state

Firstly, if the person involved is not located in the convicted member state and thus cooperation with another member state is necessary to ensure execution of the sentence, cooperation is a means to ensure that *execution in itself* can take place.

[233] The main gap in this field is the cross-border execution of disqualifications. Even though it was mentionned as a priority in the Programme of Measures implementing the principle of mutual recognition, so far that has not been an instrument regulating the entirety of cross-border execution of disqualifications, though some of the other instruments briefly touch upon it. This gap is subject of a study currently conducted by the project team of which the final report is due by the end of February. To the extent a mutual recognition instrument is recommended to fill in the current gap in the current EU instruments governing cross-border execution, the approach to double criminality suggested, is similar to the approach in the other instruments, though takes the main comments thereto into account. See more elaborately: VERMEULEN, G., DE BONDT, W., RYCKMAN, C. and PERSAK, N. The disqualification triad. Approximating legislation. Executing requests. Ensuring equivalence. Antwerp-Apeldoorn-Portland, Maklu, 2012, 365p.

If the member state of nationality and residence refuses cooperation and thus execution of the sentence imposed in the convicting member state, the person involved is protected by a double criminality shield.



However, the use of that shield will not necessarily have the best result for the person involved, depending on the reaction of the convicting member state. If the use of double criminality as a refusal ground relates to an offence that is not included in the list of offences, that refusal ground will also stand when the convicting member state seeks recourse to the EAW to have the person transferred to it in order to execute the sentence itself. If however, the refusal ground relates to any of the offences included in the 32 MR offence list for which a declaration has been issued to complement either the FD Deprivation of Liberty or FD Alternatives, that refusal ground will not stand when the convicting member state seeks recourse to the EAW. After all, the exceptions to the abandonment of the double criminality requirement in relation to the 32 MR offence list is not valid in relation to an EAW. This means that the use of the double criminality shield in reply to an execution request relating to an offence that is included in the 32 MR offence list, can have as an effect that the person will not be subject to execution in its member state of nationality or residence (where traditionally the prospects for rehabilitation are deemed to be the best)[234] but is transferred to the convicting member state following an EAW. Here too the question arises to what extent it should be possible for the person involved to argue in favour of execution in its member state of nationality or residence in

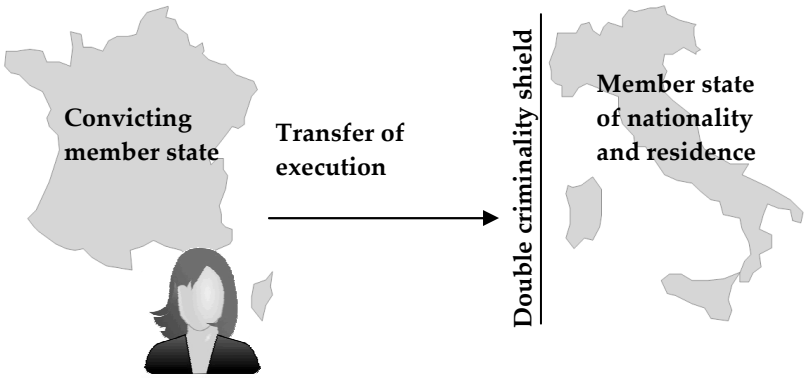
[234] This position is dealt with more elaborately in the context of a study on detention in the EU. See: VERMEULEN, G., VAN KALMTHOUT, A., PATERSON, N., KNAPEN, M., VERBEKE, P. and DE BONDT, W. Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures. Antwerp-Apeldoorn-Portland, Maklu, 2011, 310p.

spite of absence of double criminality. Although it remains controversial, already in 1968 a provision making such execution possible was introduced in the Benelux cooperation sphere. Art. 40 Benelux Execution stipulated that execution would still take place even if the underlying behaviour did not constitute an offence in the executing state but was included in the list drawn up on the basis of Art. 57.[235] A similar approach could be considered at EU level.

Person involved is in the convicting member state

Secondly, it must also be recognised that situations can exist in which execution *in itself* is not dependent on cooperation, but only the *location* of execution is dependent on cooperation. In a second scenario, the convicted person is found in the convicting member state, which means that execution is possible without any form of cooperation. In this scenario cooperation will not influence the execution *itself* but will influence the *location* of execution. It runs counter the best interests of the person involved and especially her rehabilitation prospects if her country of nationality and residence would refuse cooperation.

Upholding a strict double criminality requirement would then mean that execution in the member state of nationality is not possible.



[235] Art.40 Benelux Execution: Si la condemnation dont l'exécution est demandée se rapport à un fait qui ne constitue pas une infraction selon la legislation de l'état requis, mais est mentionné à la liste établie conformément à l'article 57, le juge substitute à la peine ou à la mesure prononcée une des peines ou measures qu'il prononcerait en vertu de sa proper legislation pour un fait correspondant selon la liste. Traité Benelux sur l'exécution des décisions judiciaires rendues en matière pénale, 29 September 1968, Benelux Official Journal, Tome 4-III. Even though it has never entered into force, this convention is worth mentioning considering the ideas underlying the abandonment of the double criminality requirement for some offence categories.

Mirroring the conflict described when discussing the transfer of pre-trial supervision, here too there is a conflict between the interest of the executing member state (who wishes to maintain the internal consistency and balance in its criminal justice system and therefore opposes to execution of sentences for which the underlying behaviour would not constitute an offence in its jurisdiction) and the interests of the person involved (who may wish to see her sentence executed in her member state of nationality and residence).

Balancing the interest of the member state and the interest of the person involved

It is legitimate for a member state to be opposed to executing sentences in relation to behaviour that is not considered to be an offence in its criminal justice system. Execution of such sentences runs the risk of creating inconsistencies and disrupting the balance in the national criminal policy. However, it is important to balance that interest of the member state with the interest of the person involved. In light thereof it is recommended to introduce a number of safeguards in the form of the possibility to start a dialogue between the person and member state involved, the outcome of which can even be subject to a judicial review.

Whenever the execution of a sentence is *refused based on a double criminality concern*, the person involved might be given the right to enter into a dialogue with the member state and present her argumentations in favour of execution in her member state of residence. When the member state of residence upholds double criminality as a refusal ground, the person involved might be given the right to start a procedure in front of a judge in the refusing member state to seek an exception to the use of that refusal ground.[236] The person involved will have the opportunity to elaborate on her arguments in favour of execution of the sentence in spite of lacking double criminality. The member state in its turn will have the opportunity to convince the judge of the reasons why execution would disproportionately disrupt the balance of and consistency within the national criminal justice system. Ultimately it will be a judge who will rule on the conflicting interests. If the judge decides that the refusal ground is justified when balancing the interests involved, execution in the member state of residence is not possible. If the person involved successfully challenged the used of double criminality as a refusal ground, the member state of nationality or residence will have to initiate the execution of the sentence.

[236] In the above described first scenario this could be to anticipate an EAW, but the possibility for judicial review will most likely be used more frequent in the second scenario, in which the person involved is situated on the territory of the investigating/prosecuting member state.

7.1.3 Ensuring an acceptable execution

Execution in a situation where there is a lack of double criminality is far from evident and will be challenging. Following the standard procedure foreseen in the both FD Deprivation of Liberty and FD Alternatives, the executing member state may adapt either the duration or the nature of the sentence to ensure compatibility with its national law. Because of the lack of detail in the adaptation provisions, it is technically possible following lack of double criminality to 'adapt' the duration of the measure to nothing, or to drastically change the nature of the sentence in a way that it loses its meaning. In both scenarios it is possible that the issuing member state deems the adaptation inacceptable and withdraws the certificate ordering the execution of the sentence.

In the event such a withdrawal is solely linked to the adaptation of the *duration* of the sentence, it can be considered to give the person involved will again have the right to present her argumentation firstly in a dialogue with the executing member state and secondly, if that fails to be successful, also to a judge with a view to waiving *her right*[237] to a reduced duration and seeking to have the sentence executed as foreseen in the original order. Completely similar to the review procedure described above, the member state will have the possibility to convince the judge of the reasons why execution of the original duration would disproportionately disrupt the balance of and consistency within the national criminal justice system. Ultimately it will be a judge who will rule on the conflicting interests. If the person involved successfully challenged the adaptation of the duration of the sentence, the member state of nationality or residence will have to execute of the sentence as originally foreseen. If the person involved is not successful, the adaptation of the duration will stand and the certificate will most likely be withdrawn.

In the event such a withdrawal is solely linked to the adaptation of the *nature* of the sentence, the situation is more complicated. Obviously, it is impossible to require the member state of nationality or residence to execute a type of sentence

[237] The wording of the adaptation provisions do not provide the person involved with a right to have the measure adapted. The provisions are drafted from the perspective of the executing member state and *allow* for an adaptation as soon as the measure is incompatible with the law of the executing member state, either with respect to the nature or the duration of the measure. However, in a previous study on the FD Deprivation of Liberty, a general concern was raised with respect to the formulation of these adaptation provisions. It is felt that a strict lex mitior should apply, meaning that measures need to be automatically adopted, leaving the executing member state no discretionary power. See G. Vermeulen, A. van Kalmthout, N. Paterson, M. Knapen, P. Verbeke and W. De Bondt, "Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures", Antwerp-Apeldoorn-Portland, Maklu, 2011, 310, p 96.

that is unknown in the national criminal justice system. In this type of situations a dialogue is necessary with the issuing member state as to which type of sentence described in the national criminal justice system of the executing member state would be acceptable.

From the above argumentation it is clear that balancing the interests of the executing member state with the interests of the persons concerned is very complex and was insufficiently developed in the current legislative instruments. A thorough debate is required in which due account is given to the position of the person involved. At least member states should consider not to introduce double criminality as a mandatory refusal ground, but to include it as an optional refusal ground to allow execution in absence of double criminality.

7.2 Cross-border effect of convictions

Second, taking account of prior convictions is the other subcategory within the domain of international validity and effect of decisions. It is regulated somewhat differently. At CoE level double criminality limits were never explicitly included in the international instruments. In Art. 56 CoE Validity it is clarified that states should legislate to enable their courts to take account of prior convictions handed down in another state with a view to include in the judgment *"all or some of the effects"* which its law attaches to judgments rendered in its territory. It is difficult to draw a double criminality-conclusion based on the wording that *"all or some effects"* can be attached to it. It is easy to say that the national effects would have been zero if the underlying behaviour is not criminal under national law, but the legal framework surrounding the effect of prior convictions is usually more complex than that. States in which the effect of a prior conviction is based solely on the sanction thresholds in prior convictions, might not have a solid legal basis to ignore foreign convictions for double criminality reasons.

The current EU instrument further complicates this matter. The FD Prior Convictions – similar to the CoE instrument and different to the other framework decisions – holds no specific provision on double criminality as a refusal ground. Its Art. 3.1 stipulates that the legal effects that are attached to foreign convictions are equivalent to the effects attached to previous national convictions, in accordance with national law. Recital 6 clarifies however that the framework decision cannot entail the obligation to attach legal effects to a conviction if the underlying behaviour could not have lead to a conviction in the member state that is conducting the new criminal proceeding. Through this provision the Council has opened the door for the introduction of a double criminality test at national level. From the perspective of the further

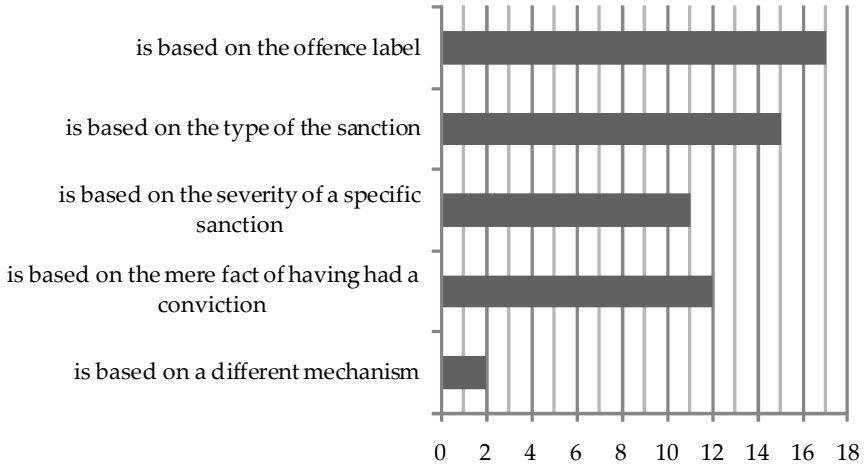
development of the EU criminal policy with respect to the priority offences that have been subject to approximation, this is a missed opportunity to reinforce the approximation obligations of the member states and to stipulate that in relation to convictions for which the underlying behaviour has been subject to approximation, double criminality verification is not allowed.

The position of double criminality beyond the list of approximated offences is strongly dependent on the technicality of the legal provisions regulating the effect that is attached to prior convictions in the domestic legal order of each of the individual member states. Member states that have introduced significant discretion for a judge to take account of a person's prior offending history whilst navigating between the minimum and maximum penalty foreseen for the isolated commission of an offence will not be confronted with double criminality restraints to taking account of foreign prior convictions that are based on the protection of the position of the person involved; Member states that have introduced a very technical set of rules that require a certain degree of similarity between the offences may need to conduct a double criminality test to allow proper application of their national provisions. However, especially with respect to member states that use prior convictions as a *true* aggravating circumstance in the sense that the judge can/must impose a penalty that exceeds the maximum foreseen for the isolated commission of the offence, double criminality restraints may emerge.

In light of the diversity in the national prior conviction related provisions, consistent EU policy making requires insight into the characteristics used as a basis for determining the effect a prior conviction will receive in the course of a new criminal proceeding. It will provide insight into the likeliness double criminality is an issue in relation to those national prior conviction related provisions

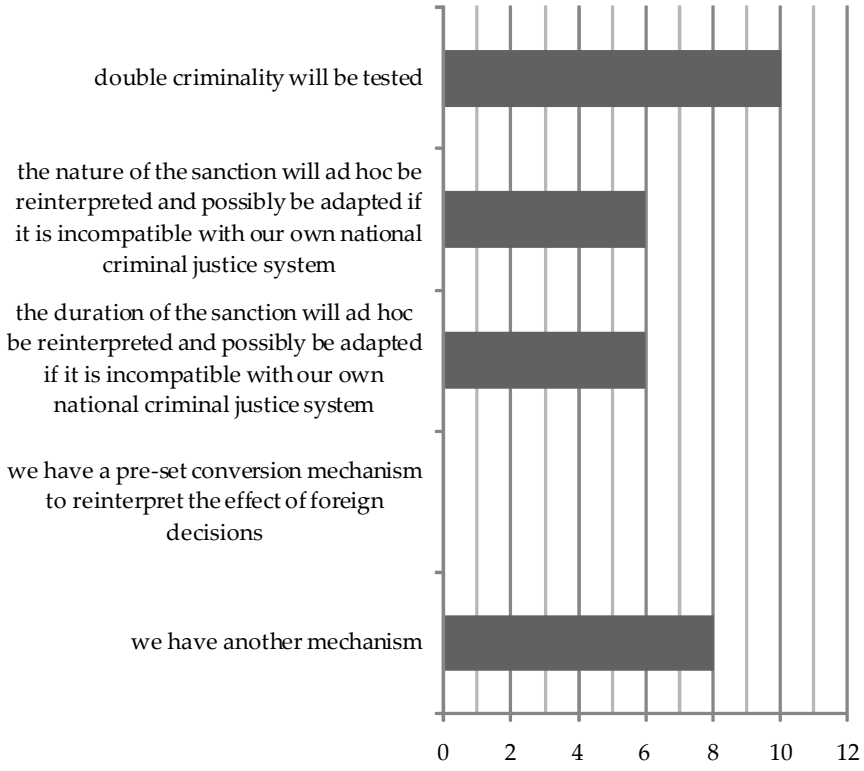
From the replies to question 4.2.11. it is clear that not all member states have the possibility to call upon double criminality issues simply because their national legal system does not use the offence label as an element when determining the effect of a prior conviction. With 17 member states indicating that the influence of a prior conviction in a new criminal proceedings is based on the label of the offence, at least 10 member states are left without the possibility to draw the double criminality card, based on the needs to properly apply their national provisions.

4.2.11 What characteristic of a prior conviction is used as a basis to determine its influence in new criminal proceedings?



When analysing the replies to question 4.2.12. it becomes clear that when implementing the obligation to attach equivalent legal effects to previous foreign convictions as to previous national convictions, the double criminality issue seems not to have been a top priority. From the 17 member states that had indicated in reply to the previous question that the effect of a prior conviction is linked to the offence label, only 10 actually test double criminality within that label.

4.2.12 How does your national law regulate the equivalent national effect foreign convictions ought to receive in the course of new criminal proceedings? (Art 3.1 FD Prior Convictions)



In order to properly assess the extent to which double criminality should be an issue in the context of taking account of foreign prior convictions, an in-depth follow-up research is necessary with respect to the general approach member states take with respect to prior convictions and more specifically with respect to the technicality of their prior conviction provisions and the possible legality inspired double criminality issues that may arise.

8 Exchange of criminal records information

Seventh and final, exchange of criminal records is analysed. The use of criminal records information is largely limited to two applications. First, there is the effect of prior convictions in the course of new criminal proceedings and second, there is the effect of prior convictions on the access to certain professions, which is regulated via so-called certificates of non-prior convictions. The importance of prior convictions in those two applications and the double criminality limits found therein, warrant the review of the double criminality issue in the exchange of criminal records information. It will be argued that problems identified here are not so much related to double criminality limitations to information *exchange*[238] but to the requirement to anticipate to double criminality issues that may rise at a later stage when criminal records information is *used* outside the convicting member state.

8.1 Diversity in the storage practice

The exchange of criminal records information too finds its origin in CoE instruments. Originally, the exchange of criminal records was regulated by Art. 13 and 22 ECMA. Based on Art. 13 ECMA a requested state had to communicate extracts from and other information relating to judicial records, requested by the judicial authorities of another state and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in a similar case. Art. 22 ECMA introduced the obligation for a convicting state to inform any other state at least annually of all criminal convictions and subsequent measures, included in the judicial records of its nationals. It is important to underline that these provisions do not entail a storage obligation. It should come as no surprise that in absence of storage obligations member states had developed different practices with respect to the handling and storing of foreign criminal records information. Some member states did not store any foreign information in their national criminal records database whereas others only stored foreign criminal records information to the extent the underlying behaviour would also constitute an offence in their member state and in doing so limited the storing of foreign criminal records information along the double criminality requirement.[239] Few member states stored all foreign criminal records information.

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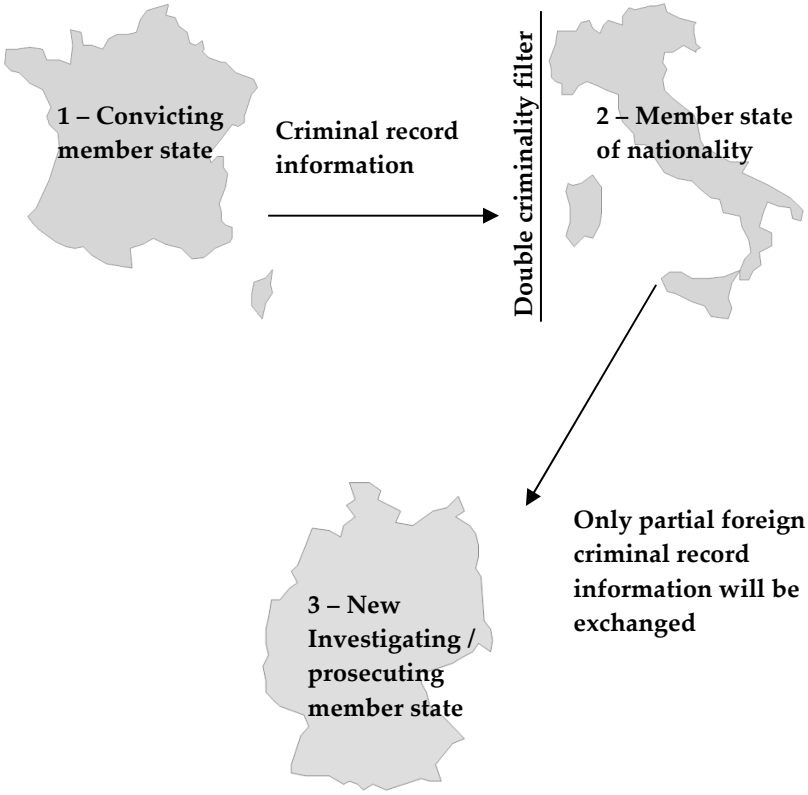
[238] Though exchange of information is inextricably bound to the storing of information and reportedly in the past, strong foreign convinction information was limited along a double criminality requirement (see *infra*).

[239] Reportedly, in the past Hungary did not store foreign criminal record information on its nationals (see Ligeti, K. (2008). The European Criminal Record in Hungaria. In C. Stefanou & H.

An important side-effect of this limited storing of foreign criminal records information is the analogous limited availability thereof in a later stage as shown in the figure inserted below. Even where a first convicting member state sends the criminal records information to a second member state (the member state of nationality of the person involved), a double criminality filter will prevent the information being stored in the persons' criminal record as compiled in the member state of the person's nationality.

If a third member state requests all available criminal records information from the member state of nationality of the person accused of having committed a new criminal offence in its jurisdiction, the information it receives will be far from complete.



Xanthaki (Eds.), Towards a European Criminal Record (pp. 181-196). Cambridge: Cambridge University Press, p. 188), neither did the UK (See Webly, L. (2008). The European Criminal Record in England and Wales. In C. Stefanou & H. Xanthaki (Eds.), Towards a European Criminal Record (pp. 291-307). Cambridge: Cambridge University Press, p. 296).

In light thereof, significant progress has been made at EU level, for the EU has introduced a storage obligation that is not limited along the double criminality requirement. A double criminality filter is not allowed. In contrast to the older CoE provisions, Art. 1.2.b FD Crim Records does specify that the objective of the framework decision consists of defining storage obligations for the member state of the person's nationality. Looking at the purpose of information exchange (i.e. ensuring that information can be used in a later stage either in the member state of the persons nationality or in any of the other member states), it is only logical for Art. 5 FD Crim Records not to limit the storage obligations along the double criminality requirement. Information is stored for the purpose of later transmission to another member state. The member state of the person's nationality involved is only a go-between. It acts as the facilitator of the compilation and exchange of information relating to a person's criminal record.

8.2 Anticipating to future double criminality issues

However, double criminality issues may come into play in a later stage, when it is to be decided what the effect of a foreign conviction should be. Taking account of a foreign prior conviction in the course of a new criminal proceeding or when assessing the access to a profession are examples thereof. Because some member states have made the application thereof dependent on being prosecuted for the behaviour that falls within the scope of the same criminalisation provision, double criminality is important. In light thereof it must be recommended that – even though the exchange of information in itself is not linked to or limited in light of the double criminality requirement[240] – already at the stage of criminal records information exchange, double criminality issues that can rise in a later stage are avoided and accommodated as much as possible.

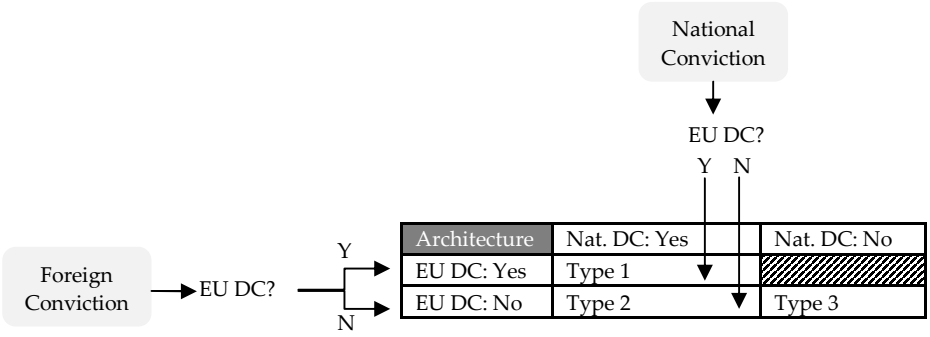
The use of an EU level offence classification system that was promoted above to limit double criminality *testing* (as opposed to abandoning the double criminality requirement in *itself*), can have an added value in this context too. Using the knowledge on whether or not the behaviour underlying the conviction is known to be criminalised throughout the EU to classify, exchange and store criminal records information will significantly facilitate the use thereof in a later stage.

[240] KLIP, A. European Criminal Law. An integrative Approach. Antwerp - Oxford - Portland, Intersentia, 2009, 531p, 321.

The table inserted below visualises how double criminality distinctions could be made. If a convicting member state indicates whether or not the underlying behaviour is known to be criminal in all other member states, this would significantly facilitate the inclusion thereof in the criminal records database of the member state of the person's nationality.

If the EU level double criminality requirement is met (i.e. EU DC: Yes), then the conviction can be included as a *type 1* conviction in the criminal records database in the member state of the person's nationality. If EU level double criminality is fulfilled national double criminality is also known to be fulfilled. Only for convictions for which the convicting member state is not sure that the underlying behaviour would constitute an offence in all 27 member states (i.e. EU DC: No), a double criminality verification would need to be conducted by the authorities in the member state of the person's nationality to allow a distinction between *type 2* convictions (i.e. foreign convictions that pass the national double criminality test – Nat. DC: Yes) and *type 3* convictions (i.e. foreign convictions that do not pass the national double criminality test – Nat. DC: No).

In parallel thereto, also national convictions should be entered into the national criminal records database, distinguishing between *type 1* convictions (i.e. national convictions for which the underlying behaviour is known to be criminalised in all 27 member states – EU DC: Yes) and *type 2* convictions (i.e. national convictions for which it is not sure that the underlying behaviour is criminalised in all 27 member states – EU DC: No).



EU DC: known EU level double criminality | Nat. DC: national double criminality test

A such architecture would facilitate later exchange and use of criminal records data. In the context of a new criminal proceeding, all convictions entered as a *type 1* can be clustered and sent to any requesting member state with the connotation that the underlying behaviour is known to be criminalised in all

member states (i.e. EU DC: Yes), therefore also in the requesting member state. Similarly, all convictions entered as *type 2* and *type 3* can be clustered together with the connotation that it is unclear whether the underlying behaviour will be considered criminal in all 27 member states (i.e. EU DC: No). A requesting member state – should it wish to do so – must conduct a double criminality verification only for type 2 and 3 convictions.

With respect to assessing the access to a certain profession, the inclusion of a such double criminality typology in the architecture of the criminal records database could overcome the currently reported difficulties with related applications such as the compilation of the certificate of non-prior-conviction.[241] Including *type 3* convictions (i.e. convictions for which the underlying behaviour does not constitute an offence according to the national legal order) into the national criminal records database without adequate identification of that double criminality issue, will inevitably cause problems with the issuing of national certificates of non-prior-convictions. It is said that those certificates are not intended to include *type 3* convictions when the certificate is intended to be used for national purposes only. Introducing a typology based architecture will allow for an easy technical solution to this problem.

Therefore, even though at first sight double criminality has no role in the exchange of criminal records exchange, there are a number of double criminality issues that are inherent to the later use of criminal records information. In light thereof it must be recommended that already when exchanging and storing criminal records information these problems are anticipated as much as possible. Though the EU has made progress through introducing storage obligations that (correctly) extend beyond double criminality limitations, not anticipating double criminality issues in light of later use of criminal records information is an important gap in the current approach to exchange criminal records information.

[241] This difficulty was already identified in a previous study on criminal records databases (i.e. VERMEULEN, G., VANDER BEKEN, T., DE BUSSER, E. and DORMAELS, A. Blueprint for an EU Criminal Records Database. Legal, politico-institutional and practical feasibility. Antwerp - Apeldoorn, Maklu, 2002, 91p) and was confirmed in the discussions during the member state visits.

9 Rethinking double criminality in international cooperation

9.1 Perspective of the issuing member state

First, when double criminality is lifted with respect to some offence ensuring the practical feasibility thereof requires that it is seen to it that an issuing member state is able to distinguish between cases that relate to offences for which double criminality has been lifted and cases for which the underlying behaviour is still subject to a double criminality verification. Whereas initially the provisions governing the abandonment of the double criminality requirement leave the scope demarcation of the offence labels to the discretion of the issuing member state, the newly introduced possibility for the executing member states to issue a declaration to the double criminality provisions clarifying the scope of the abandonment of the double criminality requirement, make that distinction is far from self-evident. Because at least with respect to the offences that have been subject to approximation, consistent EU policy making requires that no double criminality verification is allowed, an issuing member state should – as a minimum – be able to distinguish between cases that relate to behaviour that has been subject to approximation and cases that relate to any other type of behaviour.

Second, when it is agreed that double criminality is abandoned with respect to a specific form of international cooperation in criminal matters, it is important – especially from the perspective of the issuing member state – that this is done consistently. At least with respect to the abandonment of double criminality in the extradition context as a result of the evolution from extradition to surrender, it was argued that the EAW insufficiently dealt with the faith of the references to extraditable offences in some other cooperation instruments.

Third, abandoning the double criminality requirement may require an intervention as far as into the national provisions regulating e.g. the use of certain investigative measures. Analysis has revealed that the use of some investigative measures is reserved for serious situations which can be defined either referring to offences or referring to sanction thresholds. Especially from the perspective of the issuing member states, consistency in EU policy making requires that it is seen to it that the national provisions governing the use of those investigative measures are formulated in a way that allows their use even in absence of double criminality.

Fourth and final, if cooperation is truly important for an issuing member state, and refusal based on double criminality results in a deadlock, the issuing

member state must be prepared – at least in a limited set of situations – to execute the cooperation order itself. In doing so, the issuing member state takes the responsibility for its cooperation order and uses its own capacity to ensure the execution thereof. This mechanism represents the effect of the new principle *aut exequi aut tolerare* for the issuing member state.

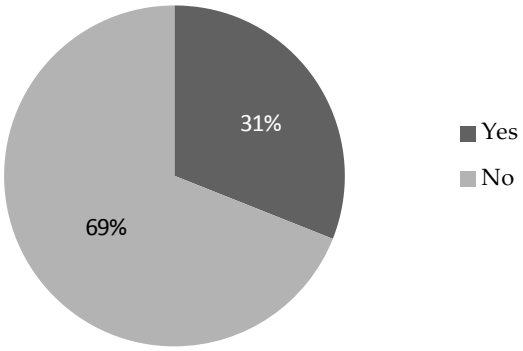
9.2 Perspective of the executing member state

First, there is nothing against allowing member states to limit cooperation based on double criminality requirement if cooperation entails the taking over of a significant part of the criminal procedure, if it relates to intrusive or coercive measures and/or if it would have a significant impact on the national capacity. From that perspective, it can be questioned whether the current willingness to abandon the double criminality requirement for a list of offences defined by the law of the issuing member state was not a step too far too soon.

Second however, consistent EU policy making does require that it is stipulated that under no circumstance can it be acceptable to call upon double criminality as a refusal ground in relation to a case for which the underlying behaviour has been subject to approximation. In that same line of argumentation, member states ought to accept the classification of the issuing member state in a case that relates to behaviour that has been subject to approximation or a case that relates to behaviour that has not been subject to approximation.

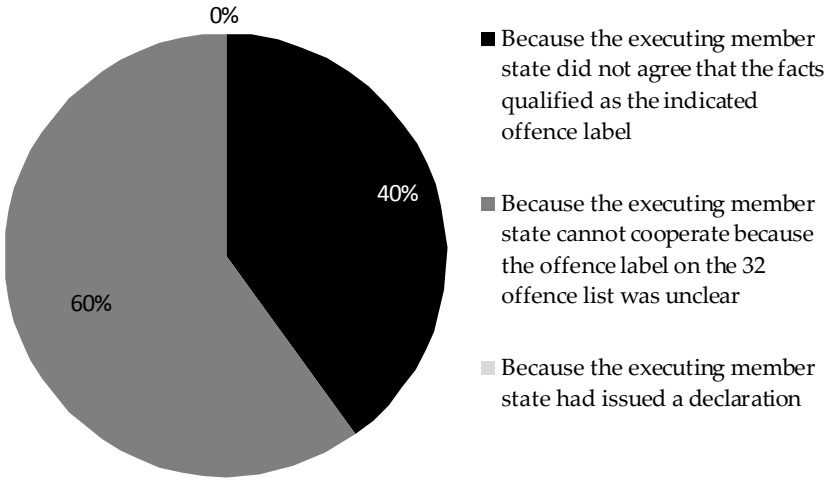
From that perspective it is interesting to look into the current trust in the classification of the cases as either or not relating to an offence that is included in the 32 MR offence list. The replies to question 2.2.4. show that 31% of the member states indicate to sometimes challenge the current classification in the 32 offence list and the accompanying abandonment of the double criminality requirement.

2.2.4 Have you ever challenged a classification in the 32 offence list as presented by the issuing member state?



Interestingly from the replies to 2.2.3. it is clear that from the issuing member state perspective, in the event that the classification in the 32 offence list is not accepted by the executing member state, this is due to a deficient scope demarcation of the listed offences. In no less than 60% of the cases this is due to uncertainty surrounding the listed offence, which is an indication that the current approach is problematic because it starts from the false presumption that no double criminality concerns will rise with respect to those 32 offences.

2.2.3 Why was your classification in the 32 offence list not accepted by the executing member state?



Third and final, as a counterweight to the possibility to call upon double criminality as a refusal ground, it can be considered to introduce – at least for some forms of cooperation – the obligation for a member state to accept the *aut exequi aut tolerare* principle which entails that a member state tolerates the presence and execution of the cooperation order by the issuing member state in its territory.

9.3 Perspective of the EU in its capacity of a criminal policy maker

First, in light of the further development of an EU criminal policy with respect to a set of offences that have been subject to approximation, the prohibition to refuse cooperation based on double criminality grounds has a significant symbolic value in light of reinforcing the criminalisation obligations of the member states. Approximation can be reinforced by abandoning the double criminality test in relation to cases for which the underlying behaviour has been subject to approximation.

Two recommendations should be made. Firstly, the list abandoning the double criminality requirement can be interpreted broadly to cover all the offences that have been subject to approximation.[242] Additionally though a consistent EU approximation policy makes sure that the list of offences for which the double criminality is abandoned is able to stand the test of time. Anticipating to the adoption of new approximation initiatives, it is advisable to draft the provisions abandoning the double criminality in a way that will ensure that those new approximation initiatives are included without requiring that the provision is amended. The fact that Art. 83(1)2 TFEU holds a list of offences which can be subject to approximation may create the false presumption that inclusion of those offences will sufficiently anticipate to any new approximation initiatives. However, Art. 83(1)3 TFEU also foresees the possibility for the Council – acting unanimously after obtaining the consent of the European Parliament – to adopt a decision identifying other areas of crime.[243] Furthermore, approximation can also be pursued via other instruments, the adoption of which is not necessarily limited along the offence type.[244] Therefore it is advised not to include *ad nominem* the offence labels and definitions for which double criminality can no longer be tested, but rather introduce a reference to a separate

[242] As clarified above, this position has to be nuanced in light of the translation issues that have arisen with respect to the offence labels included in the 32 MR offence list. This is elaborated on in GUILD, E. Constitutional challenges to the European Arrest Warrant. Nijmegen, Wolf Legal Publishing, 2006, 272p.

[243] The initiative taken with respect to insider trading and market abuse supports this point. Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, of 20.10.2011.

[244] See more elaborately: "Approximation: what's in a name" in the chapter on the ability of EULOCS to support international cooperation in criminal matters and previously also in: DE BONDT, W. and VERMEULEN, G. "Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU", in COOLS, M., Readings On Criminal Justice, Criminal Law & Policing, Antwerp-Apeldoorn-Portland, Maklu, 2010, 4, p 15-40.

instrument that provides a systematic overview of the approximation acquis and can be updated in light of new developments. The EU level offence classification system that was developed in the context of a previous study can serve this purpose and will be elaborated on extensively in one of the following chapters.

Secondly, to the extent member states wish to be allowed to issue declarations, it is important for the EU as a policy maker safeguarding its approximation acquis to see to it that the possibility to issue a declaration is drafted in a way that precludes member states from reintroducing double criminality requirements with respect to offences that have been subject to approximation.

Second, to the extent capacity as a refusal ground is accepted in relation to cases that do meet the double criminality test and it therefore constitutes a threat for cooperation in relation to cases for which the underlying behaviour has been subject to approximation, it can be considered to introduce a new cooperation principle: aut exequi, aut tolerare. That principle entails a commitment for the issuing member state in that it will execute the order using its own capacity as well as a commitment for the requested member state in that it will accept the presence and execution in its territory by another member state.

Third and final, in parallel to the reinforcement of the approximation acquis and the abandonment of double criminality testing with respect to cases for which the underlying behaviour has been subject to approximation a solid European criminal policy also requires that related policies and information exchange mechanisms are tailored to support that policy. This means that the architecture of the mechanisms developed to exchange criminal records information must reflect the acquis to allow e.g. convicting member states to indicate whether or not a particular entry in the criminal records data base is linked to the approximation acquis as a result of which double criminality with respect to that entry is not allowed for example in the context of taking account of prior foreign convictions in the course of a new criminal proceeding. The consistent development and mutual reinforcement of the policies outlined by the European Union can be significantly improved.

9.4 Perspective of the person involved

First, there is no such thing as a vested right to enjoy the protection of a double criminality shield. In an ever developing European Union it is not desirable to maintain the existence of safe havens in which persons can escape the effects of a criminal procedure.

Second, it should be considered to introduce a mechanism to ensure a balancing of the interests of the person involved with the interests of the

member state involved if raising double criminality manifestly runs counter to the best interests of the person involved. Analysis has pointed to the usefulness to consider the introduction of the possibility to engage in a dialogue with the member state involved with a view to accept execution of the order/request in absence of double criminality, at least in the context of transfer of pre-trial supervision measures and the transfer of execution of sentences. Additionally, it can be considered to what extent it is opportune to introduce a similar mechanism in the context of relocation and protection of witnesses.

Concluding, double criminality as a limit to cooperation in criminal matters is a very complex mechanism in which the interests of the persons involved, the EU criminal policy maker and the individual cooperating member states come together. From the analysis conducted the has become clear that the use of double criminality is insufficiently thought through and requires various adjustments in order to correctly balance the diversity of interests it represents and ensure consistency in EU policy making.

EULOCS in support of international cooperation in criminal matters

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Published in G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality. Antwerp-Apeldoorn-Portland: Maklu

EULOCS in support of international cooperation in criminal matters

1 Introduction

EULOCS is short for EU level offence classification system and brings together the so-called approximation acquis. It provides an overview of what is known to be common in terms of criminalisation between the member states of the EU. In several of the preceding chapters, it was observed that the diversity in the criminalisation between the member states can make cooperation complex and knowledge on what is common can provide some breathing room. The application of many mechanisms and principles turn out to be dependent on the typology of the underlying behaviour.

This chapter aims at demonstrating the need for and/or at least the added value of a EULOCS in support of international cooperation in criminal matters. In doing so, the chapter also looks into the function of the approximation acquis. Both in legal and policy documents, the function is barely mentioned and in literature hardly elaborated on.[245] To ensure a proper understanding of the argumentation developed, it is important to first provide a comprehensive introduction to EULOCS itself, its origin, its main features, its ambition. To that end, this introduction has a double focus. On the one hand approximation is elaborated on, clarifying what it entails and what the current approximation acquis looks like. On the other hand, the design of EULOCS receives significant attention, focussing on the considerations that were taken into account in the building phase and the challenges identified to keep EULOCS updated for the future.

[245] WEYEMBERGH, A. (2005). The functions of approximation of penal legislation within the European Union. Maastricht Journal of European and Comparative Law, 12(2), 149.; BORGERS, M. J. (2010). Functions and Aims of Harmonisation After the Lisbon Treaty. A European Perspective. In C. Fijnaut, & J. Ouwerkerk (Eds.), The Future of Police and Judicial Cooperation in the European Union (pp. 347-355). Leiden: Koninklijke Brill.

1.1 Approximation: what's in a name?

The first part of the introduction aims at clarifying what approximation means.[246]

In essence, approximation is not really a legal term as it is most commonly used in exact sciences and mathematics. There it is defined as the *inexact representation* of something that is still *close enough* to be useful. Surprisingly this definition turns out to fit a legal context better than one might expect. For the purpose of this chapter, approximation refers to the establishment of common *minimum standards* with respect to the constituent elements of offences.[247] This means that the approximation acquis is an *inexact representation* of the criminalisation in the member states, for it will only represent a common denominator amongst the constituent elements of offences. At the same time it is still *close enough* to be useful for it will provide valuable insight into the commonalities in the criminal justice systems of the member states. Especially knowledge on and use of those commonalities can facilitate international cooperation in criminal matters. Approximation will give you insight in the largest common denominator for which a supranational or international legal basis supporting that commonality exists. That does however not mean that the *de facto* largest common denominator cannot be even wider than what is found in approximation instruments. To the contrary, it is even very likely that the *de facto* common denominator is wider that the *de jure* common denominator provided for by the approximation acquis, because notwithstanding that far from all offences have been subject to approximation, there is e.g. some common

[246] There is no official definition of approximation, but several scholars have attempted to define it: NELLES, U. (2002). Definitions of harmonisation. in KLIP, A. and VAN DER WILT, H. Harmonisation and harmonising measures in criminal law. Amsterdam, Royal Netherlands Academy of Arts and Sciences: 31-43, VAN DER WILT, H. (2002). Some critical reflections on the process of harmonisation of criminal law within the European Union. in KLIP, A. and VAN DER WILT, H. Harmonisation and harmonising measures in criminal law. Amsterdam, Royal Netherlands Academy of Arts and Sciences: 77-87, VANDER BEKEN, T. (2002). Freedom, security and justice in the European Union. A plea for Alternative views on harmonisation. in KLIP, A. and VAN DER WILT, H. Harmonisation and harmonising measures in criminal law. Amsterdam, Royal Netherlands Academy of Arts and Science: 95-103, WEYEMBERGH, A. (2006). "Le rapprochement des incriminations et des sanctions pénales." Revue International de Droit Pénal 77(1-2): 185, KLIP, A. (2009). European Criminal Law. An integrative Approach. Antwerp - Oxford - Portland, Intersentia

[247] Because this chapter elaborates on the EU level *offence* classification system, the scope of the approximation acquis is limited accordingly, in spite of the fact that approximation can also refer to the establishment of common minimum standards with respect to the penalties involved.

understanding of what constitutes theft or murder, though even with respect to those seemingly straightforward offences, differences exist.[248]

Though all EU member states have developed their own criminal law and the decision on what does and does not constitute an offence is (to a large extent)[249] still a national prerogative, approximation is a valuable tool to identify those commonalities.

The possibility to approximate offences was formally introduced at EU level in Artt. 29 and 31(e) TEU as amended by the Amsterdam Treaty. They allowed for the adoption of measures *establishing minimum rules relating to the constituent elements of criminal acts* in the fields of organised crime, terrorism and illicit drug trafficking. The Union's overall objective is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action in the fields of police and judicial cooperation in criminal matters [...]. Approximation, where necessary, is considered to be one of the means to achieve that objective. The then new provisions were inspired by the conclusions of the High Level Group created by the Dublin European Council and tasked to examine the fight against organised crime in all its aspects.[250] The High Level Group spent considerable time discussing the possible contribution legislative approximation might offer to the fight against organised crime.[251] To that end Art. 34 TEU introduced the framework decision as a new instrument specifically designed to shape the approximation acquis. The rules governing this instrument were carefully chosen as it invites member states to agree on common criminal law provisions, leaving them with the discretionary power to choose method and means to achieve the stipulated goals. With the coming into force of the new legal framework as provided by the Lisbon treaty, directives will now be the instruments used to approximate the constituent elements of offences.

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[248] Traditionally, reference is made to the discussions surrounding the criminalisation of abortion and euthanasia to substantiate that assertion. Cadoppi, A. (1996). Towards a European Criminal Code. European Journal of Crime, Criminal Law and Criminal Justice, 1, 2.

[249] It should be noted that only recently, member states have lost their prerogative to decide what does and does not constitute an offence. Whereas before, approximation required unanimity amongst member states, the coming into force of the Lisbon treaty has made it possible to pursue approximation via a qualified majority voting. As a result, it is now possible that a criminalisation obligation is imposed on member states that have voted against a particular form of approximation.

[250] EUROPEAN COUNCIL (1996), *Dublin Presidency Conclusions*.

[251] HIGH LEVEL GROUP ON ORGANISED CRIME (1997), *Letter to the Chairman of the Intergovernmental Conference Representatives Group*, 2 May 1997, CONF 3903/97; Action Plan to combat organized crime (Adopted by the Council on 28 April 1997), OJ C 251 of 15.8.1997.

1.2 Identifying approximation acquis

Traditionally, as a result of the treaty base provided for approximation, the scope of the acquis is limited to those old framework decisions, complemented with post-Lisbon directives.[252] Framework decisions and post-Lisbon directives have been adopted for euro counterfeiting[253], fraud and counterfeiting of non-cash means of payment[254], money laundering[255], terrorism[256], trafficking in human beings[257], illegal (im)migration[258], environmental offences[259], corruption[260], sexual exploitation of a child and child pornography[261], drug trafficking[262],

[252] See also: DE BONDT, W., & VERMEULEN, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. COOLS (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

[253] Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 140 of 14.06.2000 *as amended by* the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 329 of 14.12.2001.

[254] Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, OJ L 149 of 2.6.2001.

[255] Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182 of 5.7.2001 [hereafter: FD Money Laundering].

[256] Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164 of 22.6.2002 *as amended by* Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 of 9.12.2008.

[257] Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ L 20 of 1.8.2002 *repealed and replaced* by Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, OJ L 101 of 15.4.2011.

[258] Council Framework Decision of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, *as complemented by* the Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 128 of 5.12.2002.

[259] Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law, OJ L 29 of 5.2.2003 and Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255 of 30.9.2005 *annulled and replaced by* Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328 of 6.12.2008.

[260] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192 of 31.7.2003.

[261] Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 of 20.1.2004 *repealed and replaced by* Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating

offences against information systems[263], participation in a criminal organisation[264] and racism and xenophobia[265].

However, even a quick analysis of those approximation instruments *in the treaty's sense of the word*, reveals that the approximation acquis extends beyond those instruments. The 2002 framework decision on the facilitation of unauthorised entry, transit and residence comes to testify to that conclusion. Whereas the approximation of the penalties is included in that framework decision, the approximation of the constituent elements of the offence involved is included in a separate (formerly first pillar) directive[266], even though the treaty had appointed the framework decision as the legal basis for the approximation of the constituent elements of offences.[267] This duo of complementing

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the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335 of 17.12.2011.

[262] Council Framework Decision of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335 of 11.11.2004.

[263] Council Framework Decision of 21 February 2005 on attacks against information systems, OJ L 69 of 16.3.2005.

[264] Council Framework Decision of 24 October 2008 on the fight against organised crime, OJ L 300 of 11.11.2008 [hereafter: FD Organised Crime].

[265] Council Framework Decision of 29 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328 of 6.12.2008.

[266] Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

[267] Not only does this duo of legal instruments point to the fact that the approximation acquis extends beyond the framework decisions, it also indicates that the division of competences between the former first and third pillars gave way for complex discussions in the implication of those divisions on the competence to approximate the constituent elements of offences and sanctions. The complexity is created by the fact that migration is a first pillar competence and criminal law is a third pillar competence. Therefore, the approximation competence needed to be split accordingly. The identification of the constituent elements of offences fell within the competence sphere of the first pillar, whereas the approximation of the penalty remained a third pillar competence. As a result, approximation requires the combination of two instruments. The discussion on the division of competences between the first and third pillar reached its ultimate high with the adoption of the so-called environmental framework decisions. The European Court of Justice confirmed the division as applied in the older migration file. Because the protection of the environment is a first pillar competence, the approximation of the constituent elements of environmental offences should be inserted in a first pillar instrument. With respect to the sanctions, that first pillar instrument can only include the obligation for the member states to introduce effective, proportionate and dissuasive sanctions. See: EUROPEAN COURT OF JUSTICE (Case 176/03), *Commission v. Council,* Judgment of 13.9.2005, Rec. 2005, p. I-7879; EUROPEAN COURT OF JUSTICE (Case 440/05), *Commission v. Council*, Judgment of 23.10.2007, Rec. 2007, p. I-9097; This discussion has been subject to extensive debate in literature. See e.g. S. ADAM, G. VERMEULEN and W. DE BONDT (2008), "Corporate criminal liability and the EC/EU bridging sovereignty paradigms for the sake of an area of justice, freedom and security" in *La responsabilité pénale des personnes morales en Europe. Corporate*

instruments clearly illustrates that there is more to approximation than the framework decisions and the post-Lisbon directives.

Furthermore, analysis revealed that within a European Union context, in the past approximation was also pursued via other instruments.[268] The Union has adopted joint actions and conventions that contain substantive criminal law provisions. The 1995 Europol Convention for example introduces definitions of "illegal migrant smuggling", "motor vehicle crime" and "traffic in human beings".[269] More obvious are the 1995 Convention on the Protection of the Communities Financial Interests[270] or the 1997 Convention on the fight against corruption involving Community Officials[271]. Finally, the 1998 Joint Action on drug trafficking can be mentioned.[272]

Finally, it is important to underline that this approach still fails to take into account those substantive criminal law provisions that originate from other cooperation levels, amongst which the Council of Europe and the United Nations are the most significant, even where no such *'conclusion instrument'* exists. The importance of non-EU-instruments for the European Union is emphasized through the incorporation of some of them in the so-called JHA-acquis, which lists the legal instruments, irrespective of the cooperation level at which they were negotiated, to which all EU (candidate) member states must

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Criminal Liability in Europe, La Charte/Die Keure, Bruges, 2008, 501, 373-432; A. DAWES & O. LYNSKEY. (2008). The Ever-longer Arm of EC law: The Extension of Community Competence into the Field of Criminal Law. Common Market Law Review, 45, 131; L. SIRACUSA, (2008). Harmonisation of criminal law between first and third pillar or the EU: Environmental protection as a Trojan horse of criminal law in the European first pillar? A new Statement of the ECJ. In C. BASSIOUNI, V. MILITELLO, & H. SATZGER (Eds.), European Cooperation in Penal Matters: Issues and Perspectives (pp. 62-86). Milan: CEDAM - Casa Editrice Dott. Antonio Milani.

[268] See also: WEYEMBERGH, A. (2004). L'harmonisation des législations: condition de l'espace pénal européen et rélévateur de ses tensions (Collection "études européennes"). Brussels: Éditions de l'Université de Bruxelles; DE BONDT, W., & VERMEULEN, G. (2009). Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system. In M. COOLS (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 2, pp. 87-124). Antwerp - Apeldoorn - Portland: Maklu.

[269] *Convention of 26 July 1995 on the establishment of a European Police Office* (EUROPOL), OJ C 316 of 27.11.1995.

[270] *Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests*, OJ C 316 of 27.11.1995.

[271] *Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of member states of the European Union*, OJ C 195 of 25.6.1997.

[272] Joint Action 96/750/JHA of 17 December 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the approximation of the laws and practices of the Member States of the European Union to combat drug addiction and to prevent and combat illegal drug trafficking, OJ L 342 of 31.12.1996.

conform.[273] An initial impetus for the establishment of an EU JHA acquis can be found in the 1996 action plan which lists non-EU instruments to which all member states and candidates must comply.[274] Because the Union itself underlined the importance of these non-EU instruments through the inclusion thereof into the EU JHA acquis, the Union may be expected to take those instruments into account as part of the approximation acquis. As a result, member states must accede to e.g. the United Nations *Single Convention on Narcotic Drugs*[275] or the *Council* of Europe *Convention on the Suppression of Terrorism of 27 January 1977*.[276]

Based on this analysis it is indisputable that within the EU, approximation is pursued via various sorts of instruments. It has developed rather fast and organically in the sense that it is strongly dependant on the political climate, lacking a long term consistent policy plan. When trying to assemble all the relevant provisions, analysis of framework decisions alone is insufficient. The exercise to map the approximation acquis was conducted in 2008, in the context of a study on crime statistics,[277] and kept updated ever since. At the time, the mapping exercise was intended to provide insight into the extent to which offences are known to be common in the member states and therefore there would be no definitional problems to compare the crime statistics.[278] It resulted

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[273] Up until 2009, an updated version of the acquis could be consulted on the website of the Directorate General Freedom, Security and Justice of the European Commission. Unfortunately, the split of that Directorate General into a Directorate General on Justice and a Directorate General on Home Affairs has had a baleful effect on the continuation of the JHA acquis. The most recent version available dates from October 2009 and can be consulted on the website of the Directorate General on Justice. EUROPEAN COMMISSION (2009) *Acquis of The European Union Consolidated and completely revised new version Cut-off-date: October 2009* http://ec.europa.eu/justice/doc_centre/intro/docs/jha_acquis_1009_en.pdf

[274] COUNCIL OF THE EUROPEAN UNION (1997), *Action Plan to combat organized crime (Adopted by the Council on 28 April 1997),* OJ C 251 of 15.8.1997.

[275] In the JHA acquis it is clarified that he obligation to accede is not explicit but results from the references to this instrument in the EU Action Plan on Drugs (2000-2004)

[276] In the JHA acquis it is clarified that the obligation to accede is not explicit, but results from the binding force of secondary legislation, from Council Conclusions or from Article 10 EC.

[277] A. MENNENS, W. DE WEVER, A. DALAMANGA, A. KALAMARA, G. KASLAUSKAITE, G. VERMEULEN & W. DE BONDT. (2009). Developing an EU level offence classification system: EU study to implement the Action Plan to measure crime and criminal justice (Vol. 34, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

[278] Though there can be a lot of reasons why crime statistics from one member state cannot be compared with the crime statistics of another member state, comparative criminologists argue that the problems related to the diversity in offence definitions are the most significant. See e.g. HARRENDORF, S. (2012). Offence Definitions in the European Sourcebook of Crime and Criminal Justice Statistics and Their Influence on Data Quality and Comparability. European Journal on Criminal Policy and Research, 18, 23; LEWIS, C. (1995). International Studies and Statistics on Crime and Criminal Justice. In J.-M. JEHLE, & C. LEWIS (Eds.), Improving Criminal Justice Statistics (Vol. 15, pp. 167-176). Wiesbaden: Kriminologischen Zentralstelle.

in the identification of 62 offence labels, for which approximated offence definitions existed.[279] Already at that time, it was argued that the knowledge on the scope of the approximation acquis should be used wisely to support as much as possible any policy domain that is offence-dependent, i.e. any policy domain in which knowledge on the underlying offence can be crucial to decide on the applicable rules.[280]

1.3 Building a classification system

The second part of the introduction aims at clarifying the architecture of EULOCS. If it is the intention to use the approximation acquis to its full potential and ensure that it can support international cooperation in criminal matters, it is important that the acquis is presented in a comprehensive and comprehensible way. Mirroring the approach used with respect to the JHA acquis and merely listing the instruments that comprise the approximation acquis will not provide the insight necessary for it to fulfil its supporting role. A presentation should clearly visualise the scope of the acquis and should provide insight into the extent of the commonalities in the offence definitions in the member states. It is important to immediately show what is common in terms of criminalisation of offences and where the criminalisation of offences differs between the member states. Taking those considerations into account, the decision was made to develop an offence classification system, now known as EULOCS.

When designing an offence classification system to support (amongst others) international cooperation in criminal matters, a number of considerations must be taken into account. The following paragraphs will elaborate on considerations related to first, the accurateness of what is common in light of its dependence on correct and complete implementation by the member states, second, the presentation of the distinction between what is common and what is different, and third, the compatibility of the classification system with existing classification systems.

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[279] W. DE BONDT & G. VERMEULEN (2009). Esperanto for EU Crime Statistics. Towards Common EU offences in an EU level offence classification system. In M. COOLS (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 2, pp. 87-124). Antwerp - Apeldoorn - Portland: Maklu.

[280] See also: DE BONDT, W., & VERMEULEN, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

The first consideration relates to the accurateness with which the approximation acquis provides insight into the common offences in the EU. It must be recognised that the approximation acquis as found in the international and supranational legal instruments is only an indication of the common offences in the member states. The actual existence of common offences is dependent on the correct and complete implementation of all approximation obligations. Because EU (but also non-EU) instruments suffer from poor implementation,[281] it is not unlikely that there is a discrepancy between what *should* be common and what *is* common in terms of criminalisation in the member states. However, that complexity is not taken into account in this exercise. EULOCS is built using the approximation acquis as a basis, regardless of the implementation status in the member states. This is not so much a pragmatic choice but a choice that is based on the implications poor implementation should have (in the context of international cooperation in criminal matters). The choice between either or not taking account of the implementation status is dependent on the choice whether or not poor implementation can be used as an argument (in the context of international cooperation in criminal matters). In the event cooperation is e.g. dependent on the double criminality requirement, the question arises whether it is acceptable to raise a double criminality issue with respect to an offence that has been subject to approximation and would not have caused a double criminality issue if the executing member state involved would have complied with its approximation obligation. Because that question should be answered negatively for it cannot be accepted that a member state uses its own lagging behind in the implementation of approximation instruments as an argument to refuse cooperation, the implementation status in the member states is not relevant for the design of EULOCS.

The main goal of the development of an offence classification system is the later use thereof in support of (amongst others) international cooperation in criminal matters; the goal is that the knowledge on what should be common in terms of offence definitions is used to facilitate international cooperation in criminal matters. EULOCS will be used as a tool to identify not only what is common in terms of offence definitions in the member states, but also what should be common in light of approximation obligations member states should

[281] See e.g. Report on the implementation of the Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, COM(2004) 409 final of 12.10.2004; Report from the Commission based on Article 12 of the Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography, COM(2007) 716 final of 4.12.2007; Report from the Commission – Second report based on Article 14 of the Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, COM(2006) 65 final of 10.3.2006; See also: Borgers, M. J. (2007). Implementing framework decisions. Common Market Law Review, 44, 1361.

adhere to. Incorrect or incomplete implementation cannot be accepted as an argument to limit the scope of the approximation acquis and the added value it can have in support of offence-dependent mechanisms in international cooperation in criminal matters. Therefore, the approximation acquis in its entirety is taken into account regardless of implementation issues.

The second consideration relates to the clear distinction between what is common in terms of the constituent elements of offences and where the offence stops being a *common offence* and turns into an offence for which the determination of the constituent elements is a national prerogative. In relation to this consideration, it is important to duly take account of the specificities of the legislative technique of approximation. The approximating instruments only include minimum rules for approximation, they only include those acts for which member states must ensure that they are criminalised and punishable under their national legislation. Approximation will not lead to unification. The fact that the approximation instrument only contains the minimum rules means that member states retain the competence to criminalise beyond that minimum. Member states can complement the constituent elements included in the approximation instrument with an additional set of nationally identified constituent elements and bring them all together underneath the same offence label. A reference to the offence definition of trafficking in human beings can illustrate this. Art. 2 of the 2011 directive on trafficking in human beings stipulates that member states must legislate to ensure that *the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation* is considered to be an offence. *Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.* Because these are the minimum requirements of the offence, member states can include other forms of exploitation into their national offence definition, or can decide e.g. that the use of any kind of force is not necessary for the behaviour to be punishable.[282] As a consequence, a distinction should be made between on the one hand the constituent elements that are known to be common because they were jointly identified as acts falling within the scope of an offence label and on the other hand other constituent elements that appear in national criminalisation

[282] A reference to the Belgian situation can serve as an example here. When deciding on the constituent elements of trafficking in human beings, the choice was made not to include the use of force as a required element in Art. 433 *quinquies* of the Belgian Criminal Code.

provisions as a result of the specificities of the technique of approximation. To that end a distinction was made between *jointly identified parts of the offences* – in the case of trafficking in human beings, this means a criminalization that is limited to the said forms of exploitation and requires the use of force – and *other parts of the offences* – which may include other forms of exploitation and punishability even beyond the use of force. To clearly visualize (the rationale behind) the distinction between those two parts of trafficking in human beings, the commonly defined parts of the definition will be complemented with a reference to the approximating instrument(s). Each individual externalization of trafficking in human beings, i.e. each individual purpose with which human beings are trafficked receives a separate code for future reference, and future distinction between forms of trafficking in human beings within the *jointly identified part* of the offence and *other parts* of the offence. Before inserting a snapshot of EULOCS to make the distinction between *jointly identified* and *other parts* of offences more tangible, a third consideration will be dealt with.

The third consideration relates to the compatibility of the newly developed classification system with existing offence classification systems. Within the European area of freedom, security and justice, a proliferation of classification systems is taking place. Reference can be made to the classification systems that form the backbone of the data systems of EU level actors such as Europol and Eurojust, but more recently the classification system designed to organise the exchange of criminal records information received a lot of attention. ECRIS, short for European Criminal Records Information System, is a decentralised information technology system that governs the computerised exchange of criminal records information.[283] The computerised system uses a coded offence template similar to EULOCS to classify the criminal records information based on the underlying offence. When elaborating on the added value of EULOCS with respect to information exchange (*infra*), the weaknesses of ECRIS will be clarified. Nevertheless, a perfect compatibility between EULOCS and ECRIS was achieved. To ensure the feasibility of the introduction of a system such as EULOCS, it was deemed important to ensure that the new system is perfectly compatible with all the existing systems. To that end, the offence categories used in the existing systems where catalogued and used either as a basis for the development of EULOCS[284] or as a way to fine tune and perfect EULOCS in the final stage[285]. This perfect compatibility with existing classification systems is important not only to ensure that EULOCS can be used for various purposes and

[283] Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA. OJ L 93 of 7.4.2009.

[284] This was the case for classification systems used e.g. by the European Actors

[285] This was the case for the offence classification system used in ECRIS, which was developed by the European Commission in parallel to the development of EULOCS.

an easy conversion can be guaranteed, it is also important not to jeopardise the ongoing implementation of other classification systems. It is important to note that ECRIS was developed by the European Commission in parallel to the development of EULOCS, and needs to be implemented by the member states before the end of April 2012. Taking account of the broader scope and the possibility to also use EULOCS as a basis for criminal records exchange, some member states expressed concerns with respect to the ongoing efforts to implement ECRIS. Whenever a new system is being developed and promoted whilst another (older) system is still being implemented, this might have a baleful effect on the implementation of the latter.[286] In this case however, the ongoing implementation processes where not hindered by the promotion of EULOCS as an alternative, because the (further) implementation of the existing classification systems will ultimately facilitate future transition to EULOCS.

The construction the EU Level Offence Classification System was finalised in 2009.[287] The table inserted below provides an overview of what EULOCS looks like, visualising not only the distinction between *jointly identified parts* of the offence and *other parts* of the offence, but also the coding system and the inclusion of definitions and their sources as elaborated on above. The choice was made to insert an example with respect to participation in a criminal organisation for it allows visualising the approach that was used in the event the EU's approximation instruments were complemented by non-EU approximation instruments. With respect to participation in a criminal organisation, the 2008 Framework Decision needs to be complemented with the 2000 United Nations Conviction on Organised Crime, for the latter also requests member states to foresee the punishability of knowingly taking part in the *non-criminal* activities of a criminal organisation, whereas the framework decision only refers to the punishability of a person taking part in the *criminal* activities of a criminal organisation.

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[286] Examples thereof are legio, but today the poor implementation of the European Evidence Warrant is the best example. Member state reluctance to go ahead with the implementation of the European Evidence Warrant is due to initially the echoes and now the concrete proposals for the transformation of the evidence gathering scene via the introduction of the European Investigation Order. Member states are awaiting the new instrument to ensure that no implementation efforts are in vain. A such implementation deadlock is avoided with respect to offence classification systems by stressing the perfect compatibility of the proposed EULOCS with all existing classification systems. The efforts put into the implementation of ECRIS will have a significant impact on the ease with which EULOCS will be implemented. A full overview of the compatibility between EULOCS and the other classification systems is available for CIRCA users.

[287] G. VERMEULEN & W. DE BONDT (2009). EULOCS. The EU level offence classification system : a bench-mark for enhanced internal coherence of the EU's criminal policy (Vol. 35, IRCP-series). Antwerp - Apeldoorn - Portland: Maklu.

Code level 1	PARTICIPATION IN A CRIMINAL ORGANISATION
Article 1 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	"Criminal organisation" means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit; "Structured association" means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure
Code level 1.1	**OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION**
Code level 1.1.1	**Directing a criminal organisation**
Article 2 (b) , Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.
Code level 1.1.2	**Knowingly participating in the criminal activities,** *without being a director*
Article 2 (a), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's criminal activities, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the member state concerned, even where the offences concerned are not actually committed,
Code level 1.1.3	**Knowingly taking part in the non-criminal activities of a criminal organisation,** *without being a director*
Article 5 - United Nations Convention on Transnational Organised Crime (UNTS no. 39574, New York, 15.11.2000)	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's other activities (i.e. non-criminal) in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities.
Code level 1.2	**OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy

1.4 Maintaining the classification system

Even though the construction of EULOCS was said to be finalised in 2009, the approximation acquis is not static and has evolved since then. New approximating instruments have been adopted with respect to trafficking in human beings[288] and also with respect to sexual exploitation of children and child pornography[289]. An update of the framework decision on attacks against information systems is on its way.[290] Additionally, a new instrument is being negotiated on market abuse in which the member states are to ensure that are punishable as offences.[291] The dynamic character of the approximation acquis makes it challenging to keep EULOCS updated. To that end it could be suggested to set up a panel of experts specifically assigned with that task. Furthermore, to guarantee the feasibility of using it in practice, it is required to see to it that older versions of EULOCS can still be consulted, as for some of its applications it may be important to look into the approximation acquis at any given time in the past.

Two concerns make it complex to keep EULOCS updated.

The first concern relates to the availability of an updated JHA acquis. Up until 2009, an updated version of the acquis could be consulted on the website of the Directorate General Freedom, Security and Justice of the European Commission. Unfortunately, the split of that Directorate General into a Directorate General on Justice and a Directorate General on Home Affairs has had a baleful effect on the continuation of the JHA acquis. The most recent version available dates from October 2009 and can be consulted on the website of the Directorate General on Justice. This means that an update of EULOCS can no longer rely on the inclusion of non-EU instruments in the JHA acquis available on the Commission website, but requires an analysis of the position of non-EU instruments in EU policy documents.[292]

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[288] Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA.

[289] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA.

[290] Proposal for a Directive of the European Parliament and of the Council on attacks against information systems and repealing Council Framework Decision 2005/222/JHA, COM(2010) 517 final of 6.9.2010

[291] Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, of 20.10.2011

[292] As illustrated above, some non-EU instruments are considered to be part of the EU JHA acquis because an EU instrument exists that concludes the Convention on behalf of the

The second concern relates to the increased flexibility allowed with respect to the area of freedom, security and justice. The United Kingdom and Ireland have obtained the right to opt-out,[293] whereas Denmark is excluded from participation.[294] This flexibility has significant impact on the way the approximation acquis should be dealt with. For each of the approximation instruments adopted under the legal framework established with the Lisbon Treaty, it must be assessed whether or not the United Kingdom and Ireland have opted in. With respect to the new instruments currently adopted, both member states have opted in, be it that the United Kingdom initially opted-out with respect to the Directive on trafficking in human beings.[295] With respect to the new proposal for a directive on market abuse, the position of the United Kingdom is not clear yet. Because Denmark is always excluded, it is important to consistently mention this as a caveat with respect to the newly adopted directives. It must be tested to what extent the Danish criminal law already foresees the punishability of the offences included in the new approximation instruments or is voluntarily adapting its criminal law in accordance with the new instrument.

Having introduced EULOCS – be it in a nutshell – the classification system will be brought in relation to various mechanisms to elaborate on the need therefore, at least added value thereof. The added value of EULOCS will be discussed against the background of first, the double criminality requirement, second, the mechanisms that are responsible for enhanced stringency in cooperation, third, the complexities surrounding the admissibility of evidence, fourth, the information exchange between member states and finally fifth, the functioning of the EU level actors.

European Union. Other non-EU instruments are considered to be part of the EU JHA acquis due to the position they assume in EU policy documents. The UN Single Convention on Narcotic Drugs is an example thereof, included in the EU JHA acquis following the references thereto in the EU Action Plan on Drugs (2000-2004)

[293] Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Consolidated version of the treaty on the functioning of the European Union, OJ C 115 of 9.5.2008.

[294] Protocol (No 22) on the position of Denmark, annexed to the Consolidated version of the treaty on the functioning of the European Union, OJ C 115 of 9.5.2008.

[295] Commission Decision of 14 October 2011 on the request by the United Kingdom to accept Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

2 EULOCS & double criminality

The first context in which EULOCS might be necessary, at least can have an added value relates to the position of double criminality in international cooperation in criminal matters.[296] As elaborated on in the chapter dedicated to double criminality, one of the first questions member states are confronted with in relation to international cooperation in criminal matters is what to do with a request that relates to behaviour that would not constitute an offence if committed in their jurisdiction. Though cooperation is important, it is far from self-evident that member states cooperate with respect to cases that are not criminally actionable in their jurisdiction. Mirroring the structure of that chapter on double criminality, the need for at least added value of EULOCS will be reviewed using the same three perspectives.[297] First, EULOCS will be brought in relation to double criminality from the *EU's perspective* and the need to strive for consistency and safeguard the approximation acquis. Second, EULOCS will be brought in relation to double criminality from a *member state's perspective* and the added value thereof in light of the current double criminality verifications. Third, EULOCS will be brought in relation to double criminality from the *individual's perspective* and the added value thereof in light of the possibility to transfer execution of sentences.

2.1 EU's perspective: Safeguarding the approximation acquis

Using the perspective of the EU as a policy maker, the link with EULOCS consists of ensuring policy consistency and thus safeguarding the approximation acquis. It is the responsibility of each policy maker to ensure that the policy choices made are adhered to and are not undermined by other policy choices. To safeguard the approximation acquis, it is required that double criminality as a refusal ground is not used in relation to offences that have been subject to approximation. Allowing the use of double criminality as a refusal ground in relation to offences that should have been criminalised throughout the EU effectively undermines the strength of the approximation acquis. The current

[296] See also: DE BONDT, W., & VERMEULEN, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. Cools (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

[297] In the chapter on double criminality in international cooperation in criminal matters, a distinction is made between the position of the issuing and the executing member state. For the purpose of the discussion here, both perspectives are joint together.

approach with respect to double criminality as a refusal ground does not hold that guarantee.

To explain that position, a distinction must be made between instruments with a simple double criminality clause and instruments with a more complex double criminality system due to the abandonment of the double criminality requirement for a list of 32 offences.

First, as clarified in the chapter on double criminality in international cooperation, double criminality is far from a general requirement. Though member states have made some cooperation mechanisms dependent on a double criminality requirement, other forms of cooperation can be pursued in spite of a lacking double criminality. Instruments regulating mechanisms that are made dependent on a simple double criminality clause, usually stipulate that *the act constitutes an offence under the law of the executing member state, whatever the constituent elements or however it is described*.[298] A such formulation however, is completely detached from the approximation acquis. Stipulating that cooperation may be refused if the act is not criminalised under the law of the executing member state fails to appreciate that some offences have been subject to approximation and it would therefore be inconsistent to allow member states to call upon a double criminality issue in relation those offences. To get a clear overview of the approximation acquis and therefore the offences for which double criminality as a refusal ground cannot be accepted, EULOCS can have a significant added value. The distinction included therein between *jointly identified parts* of offences and *other parts* of offences immediately reflects the boundaries of double criminality as a refusal ground. This gap in the current formulation of the refusal ground can be filled by stipulating that *"Double criminality as a refusal ground is never acceptable with respect to offences that have been subject to approximation and identified as such in the EU level offence classification system that can be consulted on the website of the European Commission"*.

Second, mutual recognition instruments hold a more complex double criminality regime, for it is abandoned with respect to a list of 32 offences and maintained for any other offence in a way that is similar to the one described above. This means that with respect to the *left-over* double criminality refusal ground in mutual recognition instruments – as a baseline – the same argument applies. Double criminality is not acceptable with respect to offences that have been subject to approximation. The question arises however, whether the approximation argument has not been sufficiently tackled by the introduction of

[298] This specific formulation can be found in the framework decision on the European arrest warrant. However, as argued in the chapter on double criminality in international cooperation in criminal matters, no standard formulation can be found. Double criminality appears in as many shapes and sizes as there are instruments referring to it.

a list of 32 offences for which double criminality is abandoned. After all, if the approximation acquis is reflected in the list of offences for which double criminality is no longer an acceptable refusal ground, the critique of not safeguarding the approximation acquis would not stand. To that end, the labels in the approximation acquis must be compared to the 32 labels included in the offence list. Analysis reveals that for the offence labels that have been subject to approximation in framework decisions or post-Lisbon directives, double criminality is abandoned through the introduction of the 32 offence list. As a result, as double criminality cannot be raise to limit cooperation, the approximation acquis seems to be sufficiently safeguarded. It seems as though the approach developed in the mutual recognition instruments is not in need of a revision to ensure that the approximation acquis is appropriately safeguarded.

However, there are two reasons why that conclusion cannot stand in light of the scope of the current approximation acquis and the dynamic character thereof.

Firstly, as argued in the introduction, the approximation acquis extends beyond what is included in framework decisions and post-Lisbon directives. When mapping the approximation acquis in 2008, no less than 62 offence labels were identified as having been subject to approximation in the EU.[299] Amongst those 62 offence labels market abuse can be found, an offence label that has been subject to approximation at Council of Europe level and found its way into the EU JHA acquis[300] and is not included in the list of offences for which the double criminality requirement has been abandoned. Furthermore, taking account of the dynamic character of the approximation acquis, it is only a matter of time before the approximation acquis included in post-Lisbon directives is extended further beyond the offence labels included in the 32 offence list. Art. 83(1)2 TFEU allows the Council, after the consent of the Parliament and acting with unanimity, to extend the list of offences that can be subject to approximation and adopt an instrument establishing minimum rules with respect to offences and sanctions beyond the 32 offence list. Retaking the example of the current proposal for a

[299] This does however not mean that the list of 32 offences should be doubled for it to encompass all 62 offence labels. The result of the mapping exercise was presented in a very detailed way, referring to all the subcategories that can be found in the approximating instruments. For corruption e.g. a distinction was made between active and passive corruption, for cybercrime e.g. a distinction was made between illegal access, illegal interception, illegal system interference and illegal data interference. As an example of an offence labels included in the 2008 mapping exercise and not included in the 32 offence list for which the double criminality requirement has been abandoned, reference can be made to market abuse and market manipulation.

[300] The approximation instrument is included in the EU JHA acquis, which can be consulted online on the website of the European Commission. Council of Europe Convention on Insider Trading, Strasbourg, 20.IV.1989.

directive with respect to insider dealing and market manipulation[301], it is likely that it will not be long before the approximation acquis extends beyond the labels included in the 32 offence list.

Secondly, the possibility introduced to issue a declaration with respect to the offence list in which member states can declare not to accept the abandonment of the double criminality requirement with respect to all or some of the listed offences, opens the possibility that double criminality as a refusal ground is reintroduced with respect to offences that have been subject to approximation. In the event a member state declares to no longer accept the abandonment of the double criminality requirement for e.g. trafficking in human beings, cooperation may be refused with respect to trafficking cases for which the underlying behaviour does not meet the double criminality requirement, in spite of the fact that the behaviour is included in an approximation instrument. Therefore, from the perspective of the EU as a policy maker responsible to ensure adherence to the policy choices it has made, the unlimited possibility to declare not to accept the abandonment of the double criminality any longer, was a bad policy choice. As a result, even the 32 offence list read together with the possibility to issue a declaration should be complemented with the above introduced provision that stipulates that refusal cannot be accepted in relation to offences that have been subject to approximation

In sum, to safeguard the approximation acquis, there is a *need* to complement the current approach with respect to the use of double criminality as a refusal ground. The *added value* EULOCS would bring consists of its simplicity, accessibility and ability to stand the test of time. If EULOCS is built in such a way that visualises the current approximation acquis at any given time, and is updated e.g. under the auspice of the European Commission in cooperation with an expert group, it would suffice to introduce a provision in the cooperation instruments stipulating that *"Double criminality as a refusal ground is never acceptable with respect to offences that have been subject to approximation and identified as such in the EU level offence classification system that can be consulted on the website of the European Commission"*

2.2 Member state's perspective: Limiting double criminality verification

From the perspective of the cooperating member states, there is a practical interest to try and limit the time dedicated to establishing whether or not double criminality is met in the event cooperation is dependent on a double criminality

[301] Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final, of 20.10.2011

requirement. To the extent cooperation is dependent on double criminality, member states reportedly loose significant time in establishing double criminality in relation to cases for which double criminality is known to be met[302] based on the approximation acquis.[303] Immediate recognition of cases that relate to offences that have been subject to approximation would limit the double criminality verification process to those cases where verification is useful which would have the potential of speeding up the cooperation process.

A such policy option obviously requires that member states seeking cooperation are able to identify a case as either or not related to an offence that has been subject to approximation. On the other hand, other member states would be required to trust and accept the classification of cases in either or not relating to offences that have been subject to approximation. In practice, this would mean that whenever seeking cooperation, member states not only mention the label of the offence for which cooperation is sought, but also whether or not the underlying behaviour falls within the scope of the approximation acquis or not. To that end, EULOCS could be used as a tool against which member states can map the cases for which cooperation in sought. Cooperation will not be sought for a case of *trafficking in human beings* full stop, but for a 0401 01 case of trafficking in human beings indicating that it relates to behaviour that is *jointly identified* as trafficking in human beings, or to a 0401 02 case of trafficking in human beings, indicating that the underlying behaviour falls outside the scope of the approximation acquis and might therefore not be considered criminal in the other member state.

This does however not mean that the added value of EULOCS and the limitation of the double criminality verification is limited to the approximation acquis. It could very well be that member states want to extend the knowledge on the fulfilment of the double criminality requirement and bring it together in a tool such as EULOCS. It is not unimaginable that member states would want to have a more developed and detailed view on the existing double criminality with respect to an offence-domain that is frequently subject to cooperation initiatives. It is not unimaginable that EULOCS is further elaborated on to also visualise and classify the offences for which double criminality is known to be met even though there is not legal instrument that can be used as a basis

[302] … or refusal based on a double criminality issue should not be acceptable due to the existence of an approximation instrument.

[303] During the focus group meetings held in the member states, the time consuming nature of double criminality testing was often raised as an issue member states are struggling with. Member states are open to look into ways that could facilitate the current approach of double criminality verification.

therefore.[304] In parallel to the trust that member states should have in one and other with respect to the classification of a case in either or not relating to behaviour that has been subject to approximation, it can be considered by the member states whether they are willing to extend that trust beyond the categories of offences that have been subject to approximation and also encompass behaviour that is known to be criminal all over the EU. If member states would be prepared to have that degree of trust in each other, EULOCS could constitute a significant added value and the use thereof result in a significant saving of time due to the abandonment of the time consuming double criminality verifications.

2.3 Individual's perspective: Strengthening the position of the person involved

Taking the perspective of the person involved, the double criminality limit to cooperation as introduced by the member states has an impact on the position of the person involved, which can be both positively and negatively perceived. If the member state in which a person is found refuses to cooperation due to a double criminality issue, the person involved will benefit from this refusal in that no action will be taken against him. If a person wishes to be transferred to another member state for the execution of the sentence, but that transfer is refused due to a double criminality issue, the person involved will perceive this as a disadvantage of the double criminality limit to cooperation.

It must be reiterated that under no circumstances a person should have the *right* to benefit from a double criminality shield. In an ever evolving European Union it is inacceptable that a person would call upon a sort of *vested right* to benefit from the protection of double criminality as a mandatory refusal ground for any of the member states. As a baseline, it should be the prerogative of the member state to decide whether or not double criminality as a refusal ground will be called upon. However, it can be argued that it may be considered to grant the person involved the right to request a member state not to call upon the double criminality requirement as a refusal ground. This links in with the

[304] In this respect it is interesting to point to the future use of approximation instruments. So far, approximation instruments have been adopted with a view to ensuring the common criminalisation of offences that are considered to be priorities in European policy making; Approximation is used as a tool to identify the behaviour that is the most reprehensible in the Union and for which common action is required. However, because simple knowledge on common offence definitions can prove interesting (amongst others) in light of the verification of double criminality as a limit to international cooperation in criminal matters, it would be interesting to open the debate as to the acceptability to use approximation also to identify the *existing commonalities* as opposed to approximation being used to establish *new commonalities*.

situation described above where a person wishes to be transferred to his member state of nationality or residence, but that transfer is blocked for reasons of lacking double criminality. Though there might not be an immediate pressing *need* in relation to the position of the person involved, in the chapter on double criminality it was suggested to *open the debate* as to the acceptability and feasibility to introduce the possibility for the person involved to enter into a dialogue with the refusing member state in order to seek execution in the member state of nationality or residence. In the course of that debate, EULOCS could have an *added value*, in the sense that should member states consider a step-by-step introduction of this mechanism singling out a limited number of offences is a first step.

To further clarify that suggestion, it must be stressed that EULOCS is more than a visualisation of what is *common* in terms of offence definitions in the member states. At times the approximating instruments also provide insight into the differences in the offence definitions for they sometimes list the behaviour for which the decision to either or not include it in the offence definition is left to the member states. A reference can be made to the framework decision on drug trafficking as an illustration. In its Art. 2 the crimes linked to trafficking in drugs and precursors are listed. Each member state shall take the necessary measures to ensure that the conduct when committed intentionally is punishable. However, that article also stipulates that the conduct described does not have to be punishable when it was committed exclusively for their own personal consumption. In doing so the framework decision does not only provide insight into the common offence definition for drug trafficking, it also provides insight into the *diversity* that will exist with respect to trafficking with a view to organising the personal consumption. Therefore, the framework decision will feed not only the *jointly identified parts* of drug trafficking, but also the *other parts* of drug trafficking, for which common criminalisation is uncertain. A number of member states, amongst which the Netherlands is the most obvious example, have decided not to criminalise trafficking with a view to organising the own personal consumption of drugs.

Taking the criminalisation of drug trafficking as an example, a situation may occur in which a Dutch national is convicted abroad to an imprisonment for three years for having trafficked drugs in spite of the fact that it was for own personal consumption. Being a Dutch national, it will not be uncommon for the person to seek a transfer back to the Netherlands and prefer execution in its member state of nationality and residence. To that end, the framework decision on the transfer of sentences involving deprivation of liberty can be used. However if the Netherlands – for the sake of the argumentation – would make execution of the foreign sentences dependent on double criminality, this would mean that the Dutch national will be denied the possibility to have its sentence

executed in its member state of nationality, which seems harsh considering that the behaviour underlying the conviction is not even punishable in the Netherlands [305] This is the reason why it was argued that member states should consider introducing double criminality as an *optional* as opposed to *mandatory* refusal ground, leaving the door open to go ahead with cooperation – *in casu* execution – in spite of a lacking double criminality.

It is not unimaginable that member states do not want to introduce this possibility for all offences and identify a number of offences for which a double criminality dialogue is made possible. If this policy option is pursued, the categorisation in EULOCS can support the identification of (parts of) offences.

3 EULOCS & proportionality and capacity

The second context in which EULOCS might be necessary or at least can have an added value consists of the mechanisms that intend to balance proportionality and capacity concerns in cooperation. Underneath this heading a built-in proportionality approach and an alternative to deal with capacity concerns will be discussed.

3.1 Considering built-in proportionality

The transformation from a request-based into an ordering-based cooperation system has sparked concerns with respect to the position of proportionality guarantees therein. Member states want to ensure that the cooperation efforts expected from them remain within the limits of what is (considered) proportionate.

In the past decade, proportionality concerns have become inextricably linked to the European arrest warrant, the mutual recognition instrument with which the member states have an extended practical experience. Because there is no real proportionality clause included in the European arrest warrant, the instrument can be used for almost any case, in spite of the fact that member states intended for it to be used only in serious cross-border situations. The European Commission has expressed its concern about the evolution to also use

[305] The example is oversimplified to avoid an unnecessary complex explanation. Technically, the execution of sentences involving deprivation of liberty can be made fully dependent on the double criminality requirement if a member state has issued a declaration stating that it will not accept the abandonment of the double criminality requirement of any of the listed offences.

the European arrest warrant for petty crime.[306] It appears that the scope limitation through stipulating that *a European arrest warrant may be issued for acts punishable by the law of the issuing member state by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months*[307] is not sufficient. Member states are entirely dependent on the way the criminal legislation in another member state is formulated and are looking into alternatives to ensure a proportionate use of the European arrest warrant and more in general the instruments governing international cooperation in criminal matters.

In the recent political debate on the European Investigation Order, this proportionality concern has lead to the introduction of a general proportionality clause, stipulating that *an EIO may be issued only when the issuing authority is satisfied that the following conditions have been met: the issuing of the EIO is necessary and proportionate for the purpose of the proceedings referred to in Article 4; and the investigative measure(s) mentioned in EIO could have been ordered under the same conditions in a similar national case.*[308] A such way of trying to ensure the proportionate use of a cooperation instrument still holds little guarantees for the receiving member states. Ultimately it is nothing more than a reminder for the issuing authority to carefully consider the necessity and proportionality for the use of the EU instrument. There is no common EU position on what should be considered proportionate and what can be subject to a proportionality debate.

Alternatively, the proportionality concern could be tackled through working with so-called built-in proportionality solutions. A such built-in strategy could effectively *build* the proportionality limits *into* the instrument. To that end, it could stipulate that the use of the instrument is in any event proportionate in relation to a selection of *jointly identified parts* of offences as indicated using

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[306] See: Report from the Commission to the European Parliament and the Council on the implementation since 2007 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2011) 175 final of 11.4.2011. The Commission clarifies that judicial authorities should use the EAW system only when a surrender request is proportionate in all the circumstances of the case and should apply a proportionality test in a uniform way across Member States. Member States must take positive steps to ensure that practitioners use the amended handbook (in conjunction with their respective statutory provisions, if any) as the guideline for the manner in which a proportionality test should be applied.

[307] Art. 2.1 Framework decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States. OJ L 190 of 18.07.2002.

[308] Art 5a Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, Brussels, 21.12.2011

EULOCS as a reference tool. For any other offence proportionality may be subject to debate and proportionality inspired refusal grounds may be introduced. To test the feasibility of working with such built-in proportionality limits, question 2.1.2 of the questionnaire aimed at gaining insight into the extent member states would consider it feasible to limit the scope of the instrument along the proportionality requirement. Amongst the possibilities presented to the member states were offence-based proportionality limits, meaning that the severity of some *jointly identified parts of offences* proportionality is automatically accepted and for other offences proportionality can be subject to debate. The replies show that in addition to a requirement for the issuing authority to carefully consider the proportionality of each case for which cooperation is sought, built-in proportionality with respect to the offences is supported by over 80% of the member states. To that end EULOCS would proof useful, as its classification and coding system would facilitate a detailed indication of the offence categories to which the use of the instrument is uncontested or for which proportionality cannot be raised as an issue limiting cooperation.

As the flipside of the coin however, practical implementation of this policy option would mean that the stringent use of the instrument is limited based on a selection of offences as included in EULOCS beyond which proportionality based refusal grounds are acceptable. Vice versa, this means that proportionality based refusal grounds are not acceptable in relation to the selected offences. In the course of a proportionality debate, the executing member state could bring capacity concerns to the table.

3.2 Recognising capacity concerns

The second concern relates to capacity issues. It must be mentioned that some concerns have not found their way into a refusal ground (yet). Though undeniably important in the consideration to either or not afford cooperation, financial nor operational capacity are listed as a refusal ground. Nevertheless, as argued elsewhere,[309] the transition from a request-based into an order-based cooperation scene may have very substantial implications on the member states' financial and operational capacity. Whereas before member states had some flexibility in dealing with cooperation requests, the transition to an order-based cooperation scene entails that member states are to execute the order in the way it was formulated by the issuing authority.

[309] VERMEULEN, G., DE BONDT, W., & VAN DAMME, Y. (2010). EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? (Vol. 37, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

Therefore, in addition to the future position of refusal grounds in international cooperation in criminal matters and the possible added value EULOCS can have, it was deemed necessarily to look into the willingness of member states to accept semi-mandatory execution of the foreign orders taking into account their potential financial and operational capacity impact.

Two policy options have been developed in this respect. The first relates to the acceptability to introduce more capacity-based refusal grounds, or at least a capacity-based acceptability to suggest less costly alternatives. The second relates to the introduction of the new *aut exequi, aut tolerare* principle, which would entail that a capacity issue results in the execution by the issuing member state.

First, it can be considered to introduce capacity as a refusal ground in instruments governing international cooperation in criminal matters. As a result, member states would be allowed to refuse cooperation if there would be a disproportionate capacity burden when brought in relation to the severity of the offence. However, because it is important not to jeopardise cooperation, especially with respect to those offences that have been attributed significant importance through being subject to approximation, the possibility to call upon capacity as a refusal ground should not be unlimited. Mirroring the argumentation developed above, the introduction of new capacity based refusal grounds should also take that consideration into account.

Second, the possibility to introduce a principle such as *aut exequi, aut tolerare* to shift the capacity burden to the issuing member state, can also be brought in relation to EULOCS as a way to limit the applicability thereof.

The *aut exequi, aut tolerare* principle is a new principle that mirrors the *aut dedere, aut exequi* principle found in extradition or surrender instruments. In extradition or surrender instruments, the unwillingness or inability of a member state to extradite or surrender a person as an obstacle for execution is overcome by the introduction of the *aut dedere aut exequi* principle. This principle introduces the obligation for the member state involved to execute the decision itself, if it is unwilling or unable to extradite or surrender the person involved.[310] A parallel *aut exequi, aut tolerare* principle would mean that the executing member state is to execute the order of the issuing member state or alternatively

[310] See more elaborately: BASSIOUNI, M.C., and WISE, E.M. (1995), Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law, Dordrecht, Martinus Nijhoff Publishers. VAN STEENBERGHE, R. (2011). The Obligation to Extradite or Prosecute: Clarifying its Nature. Journal of International Criminal Justice, 9(5), 1089. An example thereof can be found in Art. 6.2 CoE Extradition which stipulates that *[i]f the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate.*

tolerate the competent authorities of the issuing member state to conduct the order themselves on the other member state's territory. Though this technique of accepting the presence of competent authorities of another member states is not as revolutionary as it may seem for it can be found in existing cooperation instruments,[311] it can be expected that member states are reluctant to further introduce this principle in other cooperation instruments. Here too, it can be considered to limit the scope of the *aut exequi aut tolerare* principle to the *jointly identified parts* of offences, as included in EULOCS.

4 EULOCS & admissibility of evidence

The third context in which EULOCS might be necessary at least has an added value comprises the concerns related to the admissibility of evidence.

As argued elsewhere, it is important to note that the gathering of evidence is subject to two completely different regimes.[312] On the one hand, there is the mutual legal assistance regime represented by the 2000 EU Mutual Legal Assistance Convention[313] and its protocol[314], and on the other hand, there is the mutual recognition regime represented by the 2008 European Evidence Warrant.[315] Underneath this heading, it will be clarified why it is felt that admissibility of evidence is insufficiently dealt with in both of those regimes. Thereafter, the feasibility of an alternative will be elaborated on.

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[311] An example thereof can be found in the setting up of joint investigation teams. Art 13.6 EU MLA stipulates that *[s]econded members of the joint investigation team may, in accordance with the law of the member state where the team operates, be entrusted by the leader of the team with the task of taking certain investigative measures where this has been approved by the competent authorities of the member state of operation and the seconding member state.* Similarly Art 23.1 Naples II stipulates with respect to covert operations that, *[a]t the request of the applicant authority, the requested authority may authorize officers of the customs administration of the requesting member state or officers acting on behalf of such administration operating under cover of a false identity (covert investigators) to operate on the territory of the requested member state.*

[312] VERMEULEN, G., DE BONDT, W., & VAN DAMME, Y. (2010). EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? (Vol. 37, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

[313] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ L 197 of 12.7.2000 [hereafter: EU MLA Convention].

[314] Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union established by the Council in accordance with Article 34 of the Treaty on European Union, OJ C 326 of 21.11.2001.

[315] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350 of 30.12.2008 [hereafter: EEW].

4.1 Gaps in the current regimes

First, with the specific intention to tackle admissibility concerns, the principle of *forum regit actum* was introduced in the 2000 EU MLA Convention. Art 4.1 stipulates that *[w]here mutual assistance is afforded, the requested member state shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested member state.* An obligation is placed on the requested member state to comply with the requested formalities and procedures. The only exception allowed consists of an incompatibility with the fundamental principles of its law. The law of the member state that *houses* the *forum* (i.e. court) that will rule on the case has the power to decide on the applicable formalities and procedures. Therefore, Art. 4.1. is also referred to as the clause introducing the *forum regit actum* principle, abbreviated to FRA principle.

In spite of the good intentions surrounding the introduction of that principle, from the very beginning the principle was criticised highlighting its inherent flaws and weaknesses. Firstly, the FRA principle only has the potential to tackle admissibility concerns with respect to evidence that will be gathered upon an explicit request. It cannot accommodate the admissibility concerns related to evidence that was already gathered by the requested member state. No solution was found to tackle admissibility issues in relation to existing evidence. Secondly, the FRA principle lacks ambition in that it only deals with the one on one situation between the requesting and requested member state involved. This means that evidence gathered by a requested member state in accordance with the formalities and procedures explicitly mentioned by the requesting member state by no means guarantees that the evidence will be admissible in any of the other member states. In a Union where prosecution can be transferred from one member state to another, it would make sense to strive for a balance between all possible instruments involved, ensure their compatibility and complementarity and use this opportunity to introduce an evidence gathering technique that ensures admissibility of the evidence regardless of the member state that will ultimately host the procedure. What is even more, thirdly, admissibility of the evidence is not even guaranteed in the requesting member state. The way the FRA principle is formulated, the requesting member state is by no means obliged to accept the admissibility of the evidence even if it was gathered in full compliance with the formalities and procedures it requested. It is most unfortunate that the FRA principle is non-committal and does not result in a *per se* admissibility obligation for the requesting member state. Taking account of these weaknesses of the FRA principle, it is regrettable that it is copied into the European Investigation Order. It is stipulated that *[t]he executing authority shall*

comply with the formalities and procedures expressly indicated by the issuing authority unless otherwise provided in this Directive and provided that such formalities and procedures are not contrary to the fundamental principles of law of the executing State.[316]

Second, also in a mutual recognition context, the concerns related to the admissibility of evidence received too little attention, even though it was prioritised in several policy documents. Already in the Tampere conclusions it is stipulated that *the principle of mutual recognition should apply to pre-trial orders, in particular to those which would enable competent authorities to quickly secure evidence and to seize assets which are easily movable, and that evidence lawfully gathered by one member state's authorities should be admissible before the courts of other member states, taking into account the standards that apply there*.[317] The subsequent programme of measures adopted to implement the mutual recognition principle, states that *the aim, in relation to orders for the purpose of obtaining evidence, is to ensure that the evidence is admissible, to prevent its disappearance and to facilitate the enforcement of search and seizure orders, so that evidence can be quickly secured in a criminal case*.[318] In spite of the admissibility concerns raised, the EEW remains largely silent on this topic. In its 14th preamble it is stipulated that it should be possible for the issuing authority *to ask the executing authority to follow specified formalities and procedures in respect of legal or administrative processes which might assist in making the evidence sought admissible in the issuing state, for example the official stamping of a document, the presence of a representative from the issuing state, or the recording of times and dates to create a chain of evidence*. It is obvious though that a stamp will not be able to accommodate admissibility restraints that are linked to the way the evidence was gathered, the way the investigative measure was carried out. Considering that the EEW relates to existing evidence it is too late for the issuing member state to request that certain formalities and procedures are taken into account during the evidence gathering. FRA cannot solve the reported problems.

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[316] Art. 8.2, Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters, doc 18918/11 of 21.12.2011.

[317] §36 Tampere European Council (15-16 October 1999). Conclusions of the Presidency. SN 200/1/99 REV 1.

[318] Heading 2.1.1. Programme of Measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters. OJ C 12 of 15.1.2001.

4.2 Minimum standards as an alternative

As an alternative to the FRA principle the way it is found in the mutual legal assistance as well as the mutual recognition instruments, is has been argued elsewhere that it could be considered to introduce minimum standards with respect to the gathering of evidence in the EU.[319] Whenever evidence is gathered in compliance to those minimum standards, the evidence would be *per se* admissible.[320] The practical implementation of this policy option requires that minimum standards are developed with respect to each investigative measure. Though this may seem a daunting task, it should be noted that the case law of the European Court of Human Rights can be used as a starting point. In the past, the court has already clarified which procedures should be taken into account in relation to a number of investigative measures.[321] In *Van Rossem* the ECHR elaborated on the standards that should be taken into account during a house search.[322] In *Huvig & Kruslin*[323] for example the court dealt with the interception of telecommunications. In *Doorson*, *Visser* and *Solakov*[324] for example the court dealt with the testimony of anonymous witnesses.[325]

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[319] VERMEULEN, G., DE BONDT, W., & VAN DAMME, Y. (2010). EU cross-border gathering and use of evidence in criminal matters. Towards mutual recognition of investigative measures and free movement of evidence? (Vol. 37, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

[320] It should be noted that the national rules governing the admissibility of evidence vary significantly. Besides the way in which evidence was gathered, there can be various other elements that influence the admissibility of evidence. The introduction of minimum standards is only intended to tackle admissibility concerns that are related to the manner in which evidence was gathered.

[321] See also: DE BONDT, W., & VERMEULEN, G. (2010). The Procedural Rights Debate. A Bridge Too Far or Still Not Far Enough? . EUCRIM(3), 163; VAN PUYENBROECK, L., & VERMEULEN, G. (2010). Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union. In M. COOLS, B. DE RUYVER, M. EASTON, L. PAUWELS, P. PONSAERS, G. VANDE WALLE, et al. (Eds.), EU and International Crime Control (Vol. 4, pp. 41-62). Antwerpen-Apeldoorn-Portland: Maklu. VERMEULEN, G. (2011). Free gathering and movement of evidence in criminal matters in the EU. Thinking beyond borders, striving for balance, in search of coherence. Antwerp-Apeldoorn-Portland: Maklu.

[322] ECtHR, case 41872/89 Van Rossem v. Belgium, 9 December 2004

[323] ECtHR, case 11105/84 Huvig v. France, 24 April 1990 and ECtHR, case 11801/85 Kruslin v. France, 24 April 1990

[324] ECtHR, case 20524/92 Doorson v. The Netherlands, 26 March 1996, ECtHR, case 26668/95, Visser v. The Netherlands, 14 February 2002, ECtHR, case 47023/99 Solakov v. FYROM, 31 October 2001

[325] Complexities related to anonymous witnesses was already subject to an in-depth study in the past: VERMEULEN, G. (2005). EU standards in witness protection and collaboration with justice (Vol. 25, IRCP-series). Antwerp-Apeldoorn: Maklu.

The introduction of such a set of minimum standards has the potential to significantly impact on evidence gathering in the EU.

Firstly, with respect to evidence gathered upon request, it should not be a big problem to convince member states of the added value of executing the mutual legal assistance requests in a way that ensures that the evidence is gathered in compliance with the minimum standards adopted at EU level. Not only did the member states introduce an explicit legal basis in the new treaty text, the empirical evidence gathered in the context of this study also revealed that member states are willing to use that legal basis and adopt corresponding legal instruments. Should member states be unwilling to put in an extra effort and introduce the obligation to comply with the minimum standards in relation to just any offence, it can be considered to introduce the obligation to gather evidence according to the minimum standards for cases that relate to offences that have been subject to approximation and introduced under the heading of *jointly identified parts* of the offence in EULOCS. At least for the offences that have been subject to approximation and for which it may be expected that member states consider it important to strengthen the fight against those offences by ensuring that evidence gathered in a way that ensures the *per se* admissibility thereof, the introduction of binding minimum standards should be considered.

Secondly, with respect to evidence that is gathered in a mere national context, problems may arise with respect to the interpretation of the legal basis for EU intervention. Art. 82.2 TFEU only introduces the competence to adopt minimum standards to ensure the admissibility of evidence to the extent that is necessary to support cooperation and thus relates to cross-border situations. A strict reading of that legal basis does not allow it to be used to introduce minimum standards that should be followed with respect to evidence gathering in a mere domestic situation. However, the adoption of instruments implementing the Roadmap on Procedural Safeguards has illustrated that a questionable legal basis does not have to be problematic as long as member states are willing to go ahead with the adoption of EU instruments.[326] Here too, it can be considered to introduce the obligation to gather evidence in accordance with the minimum standards agreed to at EU level, either or not with respect to a selection of *jointly identified parts* of offences as included in EULOCS.

[326] See also: SPRONKEN, T., VERMEULEN, G., DE VOCHT, D., & VAN PUYENBROECK, L. (2009). EU Procedural Rights in Criminal Proceedings. Antwerp-Apeldoorn-Portland: Maklu; VERMEULEN, G. (2011). Free gathering and movement of evidence in criminal matters in the EU. Thinking beyond borders, striving for balance, in search of coherence. Antwerp-Apeldoorn-Portland: Maklu.

5 EULOCS & information exchange between member states

The fourth context in which EULOCS might be necessary at least has an added value comprises the mechanisms governing the exchange of information between the member states; not only criminal records information, but also the exchange of conviction information with a view to seeking the execution thereof.

5.1 Notifying the conviction of an EU foreign national

Recently, the legal framework governing the criminal records exchange has been subject to a make-over. Whereas originally the exchange of criminal records information was regulated by Art. 13 and 22 ECMA[327], as of April 2012, the exchange of criminal records is governed by two new EU instruments, being the framework decision on the organisation and content of criminal records[328] and the complementing decision on the development of ECRIS[329], short for the European Criminal Records Information System. As clarified in the sixth preamble it is argued that such a system *should be capable of communicating information on convictions in a form which is easily understandable*. The decentralised computerised system uses a coded offence template similar to EULOCS to classify the criminal records information based on the underlying offence. Specifically that aim of creating a coding system that ensures that exchanged criminal records information can be understood easily is criticized when compared to the added value EULOCS could have to achieve that particular goal. The table inserted below compares the two coding systems with respect to a money laundering conviction.

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[327] Art. 13 ECMA stipulates that *[a] requested Party shall communicate extracts from and information relating to judicial records, requested from it by the judicial authorities of a Contracting Party and needed in a criminal matter, to the same extent that these may be made available to its own judicial authorities in like case*; Art. 22 ECMA stipulates that *[e]ach Contracting Party shall inform any other Party of all criminal convictions and subsequent measures in respect of nationals of the latter Party, entered in the judicial records. Ministries of Justice shall communicate such information to one another at least once a year.* European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20.IV.1959.

[328] Framework Decision 2009/315/JHA on the organisation and content of the exchange of information extracted from the criminal record between Member States. OJ L 93 of 7.4.2009

[329] Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA. OJ L 93 of 7.4.2009.

Immediately it becomes clear that EULOCS is far more detailed and offers the possibility to choose one out of at least six different codes. The ECRIS coding system only includes one single code for money laundering convictions.

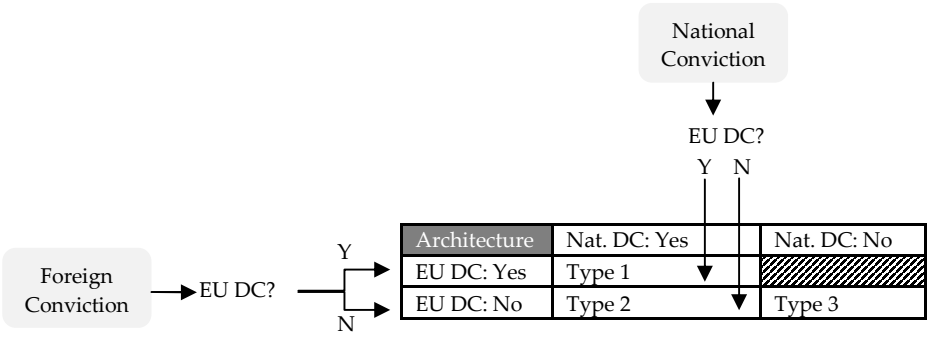
Coding system with respect to a money laundering conviction		
ECRIS	**1504**	**MONEY LAUNDERING**
EULOCS	**0906 00**	**MONEY LAUNDERING**
	0906 01	**Offences jointly identified as Money Laundering**
	0906 01 01	The conversion or transfer of property
	0906 01 02	The illicit concealment or disguise of property related information
	0906 01 03	The illicit acquisition, possession or use of laundered property
	0906 02	**Other forms of Money Laundering**

The importance of the detailed coding system becomes clear when linking it to the objective of information exchange. Criminal records information is not exchanged merely for the sake of notifying another member state of having convicted one of its nations or notifying another member state of the criminal records that is compiled with respect to one of the former's nationals. Information is exchanged for it to be used in a later stage, at a time when mechanisms are applied for which the applicable rules are dependent on the existence and specific nature of prior convictions.[330] Even though the storage of criminal records in the databases in itself are not dependent on detailed information with respect to the underlying offence, it must be recommended that already when exchanging and storing criminal records information the later use of that information is anticipated to. The architecture recommended in the chapter on double criminality in international cooperation will be retaken and brought in relation to both ECRIS and EULOCS to point to the weaknesses of ECRIS and highlight the strengths of EULOCS.

It was argued that inclusion of criminal records into a criminal records database should be done preserving as much detail as possible with respect to the underlying offence to allow future double criminality testing where relevant.

[330] Depending on the formulation of national recidivism provisions, the taking account of prior convictions in the course of a new criminal procedure can either or not be dependent on a double criminality requirement. Double criminality verification of prior convictions can slow down the sentencing phase. Convictions for which it is known that the underlying behaviour has been subject to approximation can immediately be set aside as convictions that can be taken into account without further ado.

The scheme developed in the chapter on double criminality and inserted again below visualises how double criminality distinctions could be made.



EU DC: known EU level double criminality | Nat. DC: national double criminality test

To ensure the feasibility to use foreign criminal records information in a later stage without having to request additional information, it is required that the notification of each foreign conviction is complemented with information that is sufficiently detailed to be able to distinguish between convictions for which the underlying behaviour is known to be criminalised in all EU member states and convictions for which the underlying behaviour should be subjected to a double criminality test where relevant. If the EU level double criminality requirement is met (i.e. EU DC: Yes), then the conviction can be included as a *type 1* conviction in the criminal records database in the member state of the person's nationality. If the EU level double criminality requirement is fulfilled, than national double criminality is also known to be fulfilled. Only for convictions for which the convicting member state is not sure that the underlying behaviour would constitute an offence in all 27 member states (i.e. EU DC: No), a double criminality verification would need to be conducted by the authorities in the member state of the person's nationality to allow a distinction between *type 2* convictions (i.e. foreign convictions that pass the national double criminality test – Nat. DC: Yes) and *type 3* convictions (i.e. foreign convictions that do not pass the national double criminality test – Nat. DC: No).

The currently existing coded classification system developed to support criminal records exchange is not sufficiently detailed to make that distinction. The ECRIS classification system is detached from the approximation acquis and its developers failed to see the added value of working with that acquis. As a result, the exchange of criminal records information with respect to a money laundering offence will include a reference to ECRIS code 1504, which does not

allow to the receiving member state to decide whether or not that conviction should be labelled as a conviction that meets the double criminality requirement and should be taken into account as such in any future proceeding or whether the conviction might not meet the double criminality requirement, which can be decisive for its future use.

The coded EULOCS is far more detailed. Using EULOCS as a reference index when exchanging criminal records information, the money laundering conviction will either be complemented with a 0906 01 code indicating that the behaviour relates to *jointly identified parts* of money laundering or alternatively with a 0906 02 code indicating that the behaviour relates to *other forms* of money laundering. Such a simple increase in the level of detail in the coding system can have a significant facilitating impact on the later use of the said money laundering conviction.

It was also argued that in parallel thereto, national convictions should equally be entered into the national criminal records database, distinguishing between *type 1* convictions (i.e. national convictions for which the underlying behaviour is known to be criminalised in all 27 member states – EU DC: Yes) and *type 2* convictions (i.e. national convictions for which it is not sure that the underlying behaviour is criminalised in all 27 member states – EU DC: No). A similar argumentation with respect to the added value of the use of EULOCS applies.

5.2 Seeking cross-border execution of a sentence

Besides notifying another member state of having convicted one of its nationals, a member state can also contact its counterparts in another member state seeking the execution of the conviction involved. The extent to which cross-border execution of sentences are subject to double criminality has been elaborated on in the chapter on double criminality in international cooperation. Linked thereto, the fact that EULOCS can facilitate double criminality verification has been dealt with above. What remains is the link between EULOCS and the provisions that govern the adaptation of the sentences in case there is an inconsistency with the law of the executing member state.

The mutual recognition instruments governing the cross-border execution of sentences hold a provision that regulates the fate of a sentence that is incompatible either in nature or duration with the national law of the executing member state.

- Art. 8.1 FD Fin Pen stipulates that [...] *the executing state may decide to reduce the amount of the penalty enforced to the maximum amount provided for acts of the*

same kind under the national law of the executing state, when the acts fall within the jurisdiction of that state;

- Art. 8.2 and 3 FD Deprivation of liberty stipulate that *[w]here the sentence is incompatible with the law of the executing state in terms of its duration, the competent authority of the executing state may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law* and *[w]here the sentence is incompatible with the law of the executing state in terms of its nature, the competent authority of the executing state may adapt it to the punishment or measure provided for under its own law for similar offences;*
- Art. 13.1 FD Supervision stipulates that *[i]f the nature of the supervision measures is incompatible with the law of the executing state, the competent authority in that member state may adapt them in line with the types of supervision measures which apply, under the law of the executing state, to equivalent offences;* and
- Art 9.1 FD Alternatives stipulates that *[i]f the nature or duration of the relevant probation measure or alternative sanction, or the duration of the probation period, are incompatible with the law of the executing state, the competent authority of that state may adapt them in line with the nature and duration of the probation measures and alternative sanctions, or duration of the probation period, which apply, under the law of the executing state, to equivalent offences*.

Assessing whether or not the sentence is compatible in terms of its duration and nature with the sentence that would have been imposed in the executing member state, presupposes that sufficiently detailed information is available on the offence underlying the conviction to be able to determine what the nationally imposed sentence would be. Where a custodial sentence for a period of 10 years was imposed for a money laundering offence, a simple reference to code 1504 as included in ECRIS might not be sufficient to conduct a compatibility test with respect to the duration of the sentence. Even a EULOCS code 0906 01 may not be sufficient. It is very much possible that different sanction levels are foreseen dependent on the type of money laundering offence involved. A specification of the underlying behaviour using the more detailed EULOCS coding system can provide the level of detail necessary to conduct this compatibility test. Similarly, if a person is placed under electronic surveillance for that money laundering offence, and the executing member state has not introduced electronic surveillance as a sanction measure in its national criminal justice system, it will be important that the information on the underlying offence is as detailed as possible to be able to adapt the electronic surveillance into a sentence that is in

line with the nature and duration of the sanction that would have applied under the law of the executing member state to equivalent offences.[331]

Finally, the automatic *lex mitior* principle suggested in a previous study, should be recalled.[332] In their current formulation, the adaptation provisions provide the executing member state with the *possibility* to adapt the nature or duration of the sentences in case of incompatibility with the sentence provided for in their national legal system. It was argued that it would increase consistency in EU policy making if it was considered to reshape adaptation to not be a *possibility* left to the discretion of the member state, but a *mandatory* conversion based on the lex mitior principle. If the issuing member state seeks cross-border execution of the sentence it has imposed, the issuing member state should accept the consequences thereof, especially if execution is transferred to a member state with a more lenient criminal justice system. The person involved could be granted the right to benefit from the lex mitior (i.e. the mildest regime). Moreover, during the focus group meetings, practitioners have raised concerns with respect to the motivation required when either or not adapting a foreign sentence. Furthermore, debates on the appropriateness of either or not adapting a foreign sentence can be very time consuming. To accommodate those concerns, an automatic lex mitior principle could be introduced. Automatic, in the sense that no do or don't discussion is necessary, but also in the sense that member states could work towards introducing a system that limits the intervention of a judge to those situations where it is absolutely necessary. It light thereof, complementing the execution request with a detailed EULOCS code creates the possibility for the member states to introduce an automatic conversion system that is capable of identifying the (maximum) sentence that could be imposed nationally.

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[331] The current EU level policy has not sufficiently dealt with the adaptation of sanctions, because no EU level common understanding exists on the severity ranking of the different sanctions that can be imposed and the effect of a change in the nature or the duration of the sanction. In light thereof, it is somewhat reassuring that the European Commission has launched a call for tender on the future policy with respect to the diversity in sanction mechanisms in the member states. This gap in the current EU policy was highlighted in the project proposal drafted in reply to the call.

[332] See more elaborately, particularly in the context of the cross-border executions of sentences involving deprivation of liberty : VERMEULEN, G., VAN KALMTHOUT, A., PATERSON, N., KNAPEN, M., VERBEKE, P., & DE BONDT, W. (2011). Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures (Vol. 40, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

6 EULOCS & EU level actors

Finally, EULOCS is brought in relation to the EU level actors to demonstrate its added value in that context. Eurojust and Europol are singled out as the EU level actors that will be reviewed.[333] The link between approximation and the mandates of the EU level actors has been made before,[334] but the further development thereof rarely critically evaluated. First, the added value of EULOCS will be reviewed with respect to the delineation of the mandated offences. Second, the added value of EULOCS will be reviewed with respect to the possible introduction of so-called *stronger powers*. To that end, the possible intervention of Eurojust in finding the best place for prosecution and the award of the status of 'collaborator with justice' have been singled out to serve as examples[335] thereof.

6.1 Delineating mandated offences

The mandated offences of Eurojust and Europol are closely intertwined due to the fact that the Eurojust Decision initially referred to the Europol Convention and now refers to the Europol Decision when introducing which offences the general competence is comprised of. As the first out of three criteria to delineate the scope of the mandated offences Art. 4.1(a) of the original 2002 Eurojust Decision[336] stipulated that the general competence of Eurojust shall cover *the types of crime and the offences in respect of which Europol is at all times competent to act pursuant to Article 2 of the Europol Convention of 26 July 1995.* Art. 4.1(b) added a set of additional offences and (c) provided that offences committed together with the abovementioned offences are also included. The need to complement the Europol offences with a set of additional offences was no longer felt when revisiting the Eurojust Decision as a result of which Art. 4 of the consolidated new Eurojust Decision now refers to *(a) the types of crime and the offences in respect of which Europol is at all times competent to act and (b) other offences committed together with the types of crime and the offences referred to in point (a).*[337] Therefore it

[333] The argumentation applies mutatis mutandis to the mandate of any other actor such as Frontex for example.

[334] WEYEMBERGH, A. (2005). The functions of approximation of penal legislation within the European Union. Maastricht Journal of European and Comparative Law, 12(2), 163.

[335] The argumentation applies mutatis mutandis to any other *stronger power* that is being considered to add to the competence of any of the EU level actors and for which member states wish to delineate the scope thereof in light of the offences involved.

[336] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63 of 6.3.2002.

[337] Consolidated version of Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against

is important to first look into the Europol mandated offences before elaborating on the Eurojust mandated offences.

The Europol mandate is composed of two components, being Art. 2 (now Art. 4) and the Annex thereto.[338] Art. 2 of the original Europol Convention stipulated that the objective of Europol consists of preventing and combating *terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised criminal structure is involved [...].*[339] The second paragraph further elaborates on those other forms of serious international crime, stipulating that Europol shall initially focus on *unlawful drug trafficking, trafficking in nuclear and radioactive substances, illegal migrant smuggling, trade in human beings and motor vehicle crime.* Dealing with terrorism is postponed for a maximum of two years.[340] Additionally, as of 1 January 2002 18 other serious forms of international crime clustered underneath three headings in the Annex to the Europol Convention formed an integral part of the Europol mandated offences.[341] Some of those offences have received an independent Europol definition whereas others are left undefined. With respect to those undefined offences, the Annex clarifies that *[t]he forms of crime referred to in Article 2 (now Article 4) and in this Annex shall be assessed by the competent authorities of the member states in accordance with the law of the member states to which they belong*.[342]

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serious crime as amended by COUNCIL DECISION 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, Doc 5347/3/09 of 15.7.2009.

[338] For more detail on the development of the Europol mandate see e.g. DE BONDT, W., & VERMEULEN, G. (2010). Appreciating Approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU. In M. COOLS (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu; DE MOOR, A. & VERMEULEN, G. (2010) Shaping the competence of Europol. An FBI Perspective. In M. COOLS (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 63-94). Antwerp-Apeldoorn-Portland: Maklu.

[339] Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office, OJ C 316 of 27.11.1995.

[340] See more elaborately on the inclusion of terrorism as a Europol mandated offence and the decision to introduce a two-year waiting period: VERBRUGGEN, F. (1995). Euro-cops? Just say maybe. European lessons from the 1993 reshuffle of US drug enforcement. European Journal of Crime, Criminal Law and Criminal Justice, 3, 150. DE MOOR, A. & VERMEULEN, G. (2010) Shaping the competence of Europol. An FBI Perspective. In M. COOLS (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 63-94). Antwerp-Apeldoorn-Portland: Maklu.

[341] Council Decision of 6 December 2001 extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, OJ C 362 of 18.12.2001.

[342] Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121 of 15.5.2009.

The open-ended nature of the Europol mandate has both advantages and disadvantages. First, the main advantage consists of the fact that member states are unrestricted in seeking Europol intervention. The door is open to contact Europol with respect to the said offences, whatever the definition thereof, as long as the requirements in terms of the number of member states involved are fulfilled. In spite of the disadvantages that will be dealt with in the following paragraph, this flexibility in the mandate of Europol should be maintained for the future. There is no need to clearly delineate the mandated offences and thus restrict the functioning of EU level actors in relation to all their tasks and competences. Second, the main disadvantages relate to the clarity with which the mandate is defined.[343] Firstly, looking at the need felt when elaborating on the original Eurojust mandate to add a set of offences to the offences that fall within the Europol mandate, raises questions with respect to the clarity of the approach chosen in the then Europol Convention. As already mentioned above, Art. 4.1(b) of the original Eurojust Decision added computer crime, fraud and corruption and any criminal offence affecting the European Community's financial interests, the laundering of the proceeds of crime, environmental crime and participation in a criminal organisation to the list of offences that comprise the general Eurojust mandate. However, when comparing that list to the offences included in the then Art. 2 Europol Convention as complemented with the offences included in the Annex[344], the need is unfounded. Computer crime, fraud, corruption and environmental crime are amongst the offences listed in the Annex. Laundering of proceeds of crime is listed in Art. 2.3. Participation in a criminal organisation as defined in the then joint action surely falls within the scope of organised crime which forms the basis of the Europol mandate.

Secondly, the lack of definitions for the offences in the Europol mandate has been subject to extensive debate. When discussing the extension of the Europol mandate to also encompass the offences included in the Annex, the Swedish Presidency has expressed its intention to want to discuss *whether definitions are needed for all forms of crime listed in the Annex*.[345] Not only the lack of definitions

[343] Especially the shift to serious crime more in general gives way for increased concerns. Mitsilegas, V. (2009). The Third Wave of Third Pillar Law. Which Direction for EU Criminal Justice? European Law Review, 34(4), 523; De Moor, A., & Vermeulen, G. (2010). The Europol council decision : transforming Europol into an agency of the European union. Common Market Law Review, 47(4), 1089.

[344] The Europol competence was extended to encompass also the offences included in the Annex as of 1 January 2002: Council Decision of 6 December 2001 extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, OJ C 362 of 18.12.2001.

[345] Point 3.1.b), Note from the Swedish Presidency on the possible amendments to the Europol Convention and the possible extensions of Europol's competence, Doc 5555/01 of 22.1.2001; This position was shared by Germany who stated that *when laying down the areas of crime to which*

should be criticized, also where definitions are introduced, this is done in complete isolation of the existing common offence definitions. From an offence policy perspective, the delineation of the Europol mandated offences should be criticised for not taking account of the existing EU definitions and developing a set of internal Europol definitions for its offences. A reference to the Europol definition for trafficking in human beings can serve as an example here. In the original 1995 Convention, traffic in human beings receives an autonomous Europol definition and is defined as *the subjection of a person to the real and illegal sway of other persons using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children*. Without any reference to this Europol definition, a Joint Action is adopted in 1997 providing the EU definition for trafficking in human beings to support the fight against that crime, stipulating that trafficking should be understood *as any behaviour which facilitates the entry into, transit through, residence in or exit from the territory of a member state, for the purpose of the sexual exploitation* of either a child or an adult.[346] In addition thereto, sexual exploitation is further elaborated on. In spite of the EU wide definition of trafficking in human being, developed specifically to support the fight against that crime type, the Europol definition of trafficking in human beings was adapted in 1999, without any reference to the joint action. The Europol definition of trafficking in human beings now includes *the production, sale or distribution of child-pornography material*.[347] In doing so, the distinction between the Europol definition and the other EU definition is maintained, for slight differences in the definition still exists without them being clarified let alone justified. When the joint action was repealed and replaced with a framework decision in 2002, the opportunity was not seized to coordinate the existing definitions for trafficking in human beings. More recently, the transition to the Europol Decision has again not been seized as a *coordinating* opportunity.[348] The definition in the Annex now defines trafficking in human beings as *the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent*

Europol is to give priority in accordance with Article 2(1) of the Decision, the Council will give a description of those areas. German Statement with respect to the Draft Council Decision extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, Doc 14196/01 of 4.12.2001.

[346] Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children, OJ L 63 of 4.3.1997.

[347] Council Decision supplementing the definition of the form of crime "traffic in human beings" in the Annex to the Europol Convention, OJ C 26 of 30.1.1999.

[348] It will be clarified in the following paragraphs that coordination should not be read as copying. There is no need for the definitions to be exactly the same scope.

of a person having control over another person, for the purpose of exploitation. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, the production, sale or distribution of child-pornography material, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[349], which does not fully correspond to the definition included in the 2002 framework decision.[350]

A clear definition of the mandated offences is particularly important in light of the operational competences of EU level actors. Clearly defined (semi-) operational competences require clearly defined offence definitions. In light thereof, the approach used in the original 2002 Eurojust decision to delineate the scope of participation in a criminal organisation referring to the 1998 joint action should be applauded.[351] At the same time though, it must be recalled that the inclusion of full references to approximation instruments in other EU instruments runs the risk of being outdated rather soon. However, no so much the fact that a *different* definition is used to delineate the scope of the Europol mandated offences is considered problematic, but the fact that it is *detached* from the approximation acquis, and it is therefore not transparent what the difference between both definitions is. It should be stressed that it is very much possible that the Europol mandated offence only reflects part of the approximation acquis. It would not be illogical to limit certain strong powers *(infra)* of EU level actors to only some forms of trafficking in human beings. From that perspective, the suggestion made by the European parliament that *if the Council adopts framework decisions determining the constituent elements of individual criminal offences these shall replace the corresponding provisions of the Europol Convention and the Annexes thereto*[352] comes close but is not a good solution. Alternatively, whenever adopting an instrument in which constituent elements of offences are defined, a discussion should be held on the relation between those newly defined offences and the mandates of the EU level actors. For each

[349] Council Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), OJ L 121 of 15.5.2009.

[350] Framework decision of 19 July 2002 on combating trafficking in human beings OJ L 203 of 1.8.2002.

[351] It is unfortunate however that the Eurojust Decision fails to refer to the 1995 Convention on the Protection of the European Communities' Financial interests (OJ C 316 of 27.11.1995), nor to the 1997 Convention on the fight against corruption involving Community Officials (OJ C 195 of 25.6.1997). Furthermore, it is unfortunate that the reference was not updated when the 1998 joint action was repealed by the 2008 FD on organised crime (OJ L 300 of 11.11.2008).

[352] European Parliament legislative resolution on the initiative of the Kingdom of Belgium and the Kingdom of Sweden with a view to adopting a Council decision extending Europol's mandate to deal with the serious forms of international crime listed in the Annex to the Europol Convention, OJ C 140/E of 13.6.2002.

approximation instrument, it should be clarified what the relation thereof is with the mandates of the EU level actors.

In sum, the practical implementation of that approach results in a system that delineates the mandated offences using a double approach. For the purpose of allowing the member states to seek the intervention of the EU level actor, the offence labels are left undefined at EU level and *shall be assessed by the competent authorities of the member states in accordance with the law of the member states to which they belong*, as currently stipulated in the Europol Annex. Additionally, when it comes to delineating the scope of (especially) the *strong powers* of the EU level actors, the offences will be delineated referring to the coded EU level offence classification system, which will be used to indicate for which offence categories member states have accepted a strong power. To make this latter recommendation more tangible, two possible *strong powers* for which it can be considered to add them to the Eurojust competences, are briefly elaborated on in the following paragraphs.

6.2 Finding the best place for prosecution

The first example of a *stronger power* that can be granted to Eurojust relates to the decision on the best place for prosecution. Especially when dealing with cross-border crime, it is not uncommon that more than one member state has the jurisdiction to deal with the case. Even more, the jurisdiction clauses in the approximation instruments require that member states legislate in a way that establishes its jurisdiction to deal with the approximated offences, not only where *(a) the offence is committed in whole or in part in its territory*, but also *(b) the offence is committed on board a vessel flying its flag or an aircraft registered there, (c) the offender is one of its nationals or residents, (d) the offence is committed for the benefit of a legal person established in its territory or (e) the offence is committed against the institutions or people of the member state in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that member state.*[353] By making extraterritorial jurisdiction mandatory, the EU creates positive jurisdiction conflicts. In light thereof, it is not illogical for the EU to also introduce a system to settle those jurisdiction conflicts.

With its 2003 annual report, it became clear that Eurojust was developing into a centre of excellence when it comes to the settlement of jurisdiction conflicts. The Annex holds *[g]uidelines for deciding "which jurisdiction should*

[353] This formulation was copied from Art. 9 Framework decision of 13 June 2002 on combating terrorism OJ L 164 of 22.06.2002. Similar provisions can be found in other approximation instruments.

prosecute". A set of criteria is elaborated on that can be used to decide which of the competent jurisdictions should get preference, reflecting the conclusions of a seminar organised to discuss and debate the question of which jurisdiction should prosecute in those cross border cases where there is a possibility of a prosecution being launched in two or more different jurisdictions.[354]

Taking account of the prominent role Eurojust already plays advising member states how to settle a jurisdiction conflict and taking account of the explicit introduction of the possibility to extend the Eurojust mandate with *the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction* in Art. 85.1(c) TFEU, the momentum could be seized to extend the Eurojust mandate accordingly. It could be considered to introduce an obligation for member states to present a jurisdiction conflict to Eurojust for a binding settlement thereof. However, considering that it would not be wise to flood Eurojust with settlement cases and considering that member states would not accept such a binding settlement for any offence, not even all offences in the general Eurojust mandate, it is important to clearly delineate the offences for which this competence is introduce. Different than the technique used in Art. 13.6 of the revised Eurojust Decision to delineate the offences to which the strict rules governing the exchange of information apply, the scope of the offences could be clearly delineated using the EULOCS categories as a reference. As clarified above when criticising the introduction of an independent Europol definition for trafficking in human beings, it is very much possible that this competence to settle jurisdiction conflicts is introduced not for any form of trafficking in human beings, not even for the approximation acquis for trafficking in human beings, but only with respect to a selection of *jointly identified parts* thereof.

6.3 Awarding the status of collaborator with justice

The second example of a *stronger power* that can be granted to Eurojust relates to the award of the status of collaborator with justice. As elaborated in the chapter on double criminality, a person granted the status of collaborator with justice enjoys the benefit of immunity from prosecution. It is important to note that not all member states have a legal framework for this status, and where the status exists, it is most commonly used for persons prosecuted for participation in a criminal organisation and who have decided to collaborate with justice with a view to being immune for prosecution for their crimes. It was argued that mutual recognition of the status of collaborator with justice is essential for its

[354] See also the recommendations formulated in VANDER BEKEN, T., VERMEULEN, G., STEVERLYNCK, S., & THOMAES, S. (2002). Finding the best place for prosecution (Vol. 12, IRCP-series). Antwerp-Apeldoorn: Maklu.

success. The status of collaborator with justice and the immunity from prosecution that comes along with it, loses a lot (if not all) of its persuasive strength if it is not recognised throughout the EU. In other words, if the status of a collaborator with justice is not mutually recognised by all member states, the value thereof is significantly eroded. *Per se* recognition of the immunity from prosecution is the only way to guarantee the success of awarding a person the status of collaborator with justice.

The outcome of the focus group meetings in the member states have clarified that member states are not unconditionally willing to accept such a *per se* recognition of the immunity from prosecution. Member states have indicated that immunity from prosecution should only be granted in exceptional cases in which it is clear that the help of the person involved is crucial for the investigation and prosecution of the facts and the severity of the offences involved justify the granted immunity. It is clear that member states are not willing to accept this status with respect to minor offences. The categorisation of offences in EULOCS can prove to be a welcome tool used to identify for which of the *jointly identified parts* of offences, member states are willing to accept immunity from prosecution. Furthermore, the member states have indicated that the award of the status of collaborator should be further restricted. In light thereof, it can be recommended to appoint Eurojust as the independent body deciding on the appropriateness of the award of such a status. The possibility could be considered to introduce a mandatory consultation of Eurojust in the sense that it could advise member states prior to granting the status of collaborator with justice and the immunity from prosecution linked thereto. In this scenario, mutual recognition could be limited to cases that received a positive Eurojust advice. Perceived from a Eurojust *mandate* perspective, this would mean that Eurojust is given the competence to decide on the appropriateness of the award of the status of collaborator with justice and the immunity from prosecution that comes along with it, with respect to a selection of *jointly identified parts* of offences as indicated in EULOCS.

7 Conclusion

Member states are struggling with the offence diversity between the national criminal codes when they are engaging in international cooperation in criminal matters. Part of that struggle can easily be avoided if the knowledge on the approximation acquis is used to its full potential.

EULOCS proves to be a useful tool at least to identify the offences:

- for which cooperation can be speed up by lifting redundant double criminality verification because double criminality is known to be met based on the approximation acquis and allowing a double criminality based refusal would be inconsistent from an approximation perspective;
- for which cooperation could be stepped up if the request to deploy a specific investigative measure would be considered *per se* proportionate (vice versa, it also provides insight into the offences in relation to which a cooperation request can be subject to a proportionality discussion);
- for which it could be considered to prohibit capacity issues from being raised and/or for which an *aut exequi, aut tolerare* principle could be introduced;
- for which the rules governing admissibility of evidence gathered abroad (be it or not following a cross-border request) should be drawn up;
- for which criminal records information exchange could be reorganised to ensure inclusion of sufficiently detailed information with a view to facilitating later use of the criminal records information;
- for which the identification of the equivalent sentence could be automated to support the application of the adaptation provisions prior to the start of the execution of a foreign sentence; and
- that form the basis for the delineation of the mandated offences of the EU level actors and thus clarify the scope of some of their tasks and competences.

Consistent EU policy making supports cooperation between member states where it can, especially when such support also helps safeguard the approximation acquis, which would logically be an EU policy priority.

8 Annex: EULOCS

This annex includes the original version of EULOCS as published in Vermeulen, G., & De Bondt, W. (2009). EULOCS. The EU level offence classification system: a benchmark for enhanced internal coherence of the EU's criminal policy (Vol. 35, IRCP-series). Antwerp - Apeldoorn - Portland: Maklu

0100 00 Open Category	CRIMES WITHIN THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT
	The International Criminal Court (ICC) is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes. The ICC is based on a treaty, joined by 106 countries. The jurisdiction and functioning of the ICC are governed by the Rome Statute.
0101 00	GENOCIDE
Article 6 of the Statute of the ICC	"Genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.
0102 00	CRIMES AGAINST HUMANITY
Article 7 of the Statute of the ICC	"Crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...] or other grounds [...] (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally

	causing great suffering, or serious injury to body or to mental or physical health. 2. For the purpose of paragraph 1: (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 [...]; (b) 'Extermination' includes the intentional infliction of conditions of life, inter alia [...]; (c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person [...]; (d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned [...]; (e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; [...]; (f) 'Forced pregnancy'[...] (g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; (h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; (i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons [...].
0103 00	**WAR CRIMES**
Article 8 of the Statute of the ICC	"War crimes" means: (a) Grave breaches of the Geneva Conventions [...]: (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law: [...] (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause: [...] (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: [...] (f) Paragraph 2 (e) applies to armed conflicts not of an

	international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. 3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.
0104 00	**CRIMES OF AGGRESSION**
0200 00 Open Category	**PARTICIPATION IN A CRIMINAL ORGANISATION**
Article 1 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	"Criminal organisation" means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit; "Structured association" means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure
0201 00	**OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION**
0201 01	**Directing a criminal organisation**
Article 2 (b) , Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.
0201 02	**Knowingly participating in the criminal activities,** *without being a director*
Article 2 (a), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's criminal activities, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the member state concerned, even where the offences concerned are not actually committed,
0201 03	**Knowingly taking part in the non-criminal activities of a criminal organisation,** *without being a director*

Article 5 - United Nations Convention on Transnational Organised Crime (UNTS no. 39574, New York, 15.11.2000)	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's other activities (i.e. non-criminal) in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities.
0202 00	**OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0300 00 Open Category	**OFFENCES LINKED TO TERRORISM**
Article 1 - Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Terrorist offences are those offences committed with a specific intent: i.e. "committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental"
0301 00	**PARTICIPATION IN A TERRORIST GROUP**
Article 1 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	A terrorist group is an organised criminal group, committing offences with a terrorist intent. A criminal organisation shall mean a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits;
0301 01	**Offences jointly identified as participation in a terrorist group**
0301 01 01	Directing a terrorist group
Article 3 - Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	
0301 01 02	Knowingly participating in the activities of a terrorist group, without being a director
	Participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group
0301 02	**Other forms of participation in a terrorist group**

	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0302 00	**OFFENCES LINKED TO TERRORIST ACTIVITIES**
0302 01	**Offences jointly identified as linked to terrorist activities**
Article 3 - Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA) As amended by: Article 1 – Council Framework Decision of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism	
0302 01 01	Public provocation to commit a terrorist offence
Article 1 – Council Framework Decision of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism	Distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h) of the Framework Decision on Terrorism (i.e. EULOCS cat 0303 01 until 0303 09), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed;
0302 01 02	Recruitment for terrorism
Article 1 – Council Framework Decision of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism	To solicit another person to commit one of the offences listed in Article 1(1) (a) to (h) (i.e. EULOCS cat 0303 01 until 0303 09), or in Article 2(2) of the Framework Decision on Terrorism
0302 01 03	Training for terrorism
Article 1 – Council Framework Decision of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism	To provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the offences listed in Article 1(1) (a) to (h) (i.e. EULOCS cat 0303 01 until 0303 09), knowing that the skills provided are intended to be used for this purpose
0302 01 04	Aggravated theft with the view of committing a terrorist offence
0302 01 05	Extortion with the view of committing a terrorist offence
0302 01 06	Drawing up false administrative documents with the view of committing a terrorist offence
0302 01 07	Financing of terrorism
0302 02	**Other offences linked to terrorist activities**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to

	uphold a more strict criminal policy
0303 00	**TERRORIST OFFENCES**
Article 1.1 of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Terrorist offences are "Offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of: - seriously intimidating a population, or - unduly compelling a Government or international organisation to perform or abstain from performing any act, or - seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation" The Framework Decision lists provides us with a list with the absolute minimum of what shall be deemed to be terrorist offences: That list is used to make the break down structure in the classification and now constitute the subcategories in this section:
0303 00	**Offences jointly identified as terrorist offences**
Article 1 of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	
0303 01	Terrorist attacks upon a person's life
0303 02	Terrorist attacks upon a person's physical integrity
0303 03	Terrorist kidnapping or hostage taking
0303 04	Causing extensive terrorist destruction
Article 1 (d) of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Causing extensive terrorist destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
0303 05	Terrorist seizure of transport
0303 06	Terrorist activities related to weapons
Article 1 (f) of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons
0303 07	Terrorist release of dangerous substances, or causing fires, floods or explosions
Article 1 (g) of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Terrorist release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life

0303 08	Terrorist interfering with or disrupting the supply of a fundamental natural resource
Article 1 (h) of the Framework Decision 2002/475/JHA, on combating terrorism (2002/475/JHA)	Terrorist interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life
0303 09	Threatening to commit any of the terrorist acts listed
0304 10	**Other terrorist offences**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0400 00 Open Category	**TRAFFICKING IN HUMAN BEINGS**
Article 1 – Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings	"Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where: (a) use is made of coercion, force or threat, including abduction, or (b) use is made of deceit or fraud, or (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit tithe abuse involved, or (d) payments or benefits are given or received to achieve the consent of a person having control over another person for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.
0401 00	**TRAFFICKING OF AN ADULT**
Article 1.4 – Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings	Adult shall mean: "any person of 18 years of age or above"
0401 01	**Offences jointly identified as trafficking of an adult**
0401 01 01	For the purposes of labour or services exploitation
Article 1 – Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings Article 4 - Council of Europe Convention on	Labour or services exploitation shall constitute at least what is defined by the subcategories in this section: - Forced or compulsory labour or services - Slavery or practices similar to slavery or servitude, which is defined as: The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons

Action against Trafficking in Human Beings (Warsaw, 16.V.2005)	convicted thereof shall be liable to very severe penalties
0401 01 02	For the purposes of sexual exploitation
Article 1 – Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings Article 1 of the 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	Prostitution and Sexual Exploitation: Sexual exploitation of an adult contains at least: (a) Procuring, enticing or leading away, for purposes of prostitution, another person, even with the consent of that person; (b) Exploiting the prostitution of another person, even with the consent of that person; (c) Keeping or managing, or knowingly financing or taking part in the financing of a brothel; (d) Knowingly letting or renting a building or other place or any part thereof for the purpose of the prostitution of others
0401 01 03	For the purposes of organ or human tissue removal
In analogy with: Article 3(1) I (b) of the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	A human tissue is a collection of interconnected cells that perform a similar function within an organism. This category also includes the removal of a single cell.
0401 04	**Other forms of trafficking of an adult**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0402 00	**TRAFFICKING OF A CHILD**
Article 1.4 – Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings	Child shall mean: "any person below 18 years of age"
0402 01	**Offences jointly identified as trafficking of a child**
0402 01 01	For the purposes of labour or services exploitation of a child
Article 2 Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA) Article 3(1) I (b) of the 2000 UN Optional	Labour or services exploitation shall constitute at least what is defined by the subcategories in this section: - Forced or compulsory labour or services - Slavery or practices similar to slavery or servitude, which is defined as: The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties

Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	
0402 01 02	For the purposes of sexual exploitation
Article 2 Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Prostitution and Sexual Exploitation of a Child: Sexual exploitation of a child shall contain at least (a) Coercing or recruiting a child into prostitution or into participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes and (b) Engaging in sexual activities with a child; where use is made of coercion, force or threats, where money or other forms of remuneration or consideration is given as payment in exchange for the child engaging in sexual activities, where abuse is made of a recognised position of trust, authority or influence over the child
0402 01 03	For the purposes of organ or human tissue removal of a child
Article 3(1) I (b) of the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	A human tissue is a collection of interconnected cells that perform a similar function within an organism. This category also includes the removal of a single cell.
0402 02	**Other forms of trafficking of a child**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0402 02 01	For the purpose of recruiting child soldiers
Article 4 of the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	Child Soldiers: Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
0402 02 02	For the purpose of illegal adoption
Article 3(1) a (ii) of the 2000 UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography	Illegal Adoption: Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis: (a) In the context of sale of children as defined in article 2(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption
0402 02 03	For other or unknown purposes
	Rest category, as the jointly identified forms an on offences type

	only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0500 00 Open Category	**SEXUAL OFFENCES**
	Sexual offences is a main cluster, including, sexual assault, sexual exploitation, prostitution and pornography
0501 00	**SEXUAL ASSAULT**
	Sexual assault consists of any verbal, visual or other act that forces a person to join in or be confronted with unwanted sexual attention or contact
0501 01	**Rape**
	Rape constitutes any act of sexual penetration (per vaginam or other) by whatever means, of a person against his or her will
0501 01 01	Rape of an adult
	Rape of an adult constitutes any act of sexual penetration (per vaginam or other) by whatever means, of any person above 18 years of age against his or her will
0501 01 02	Rape of a child
	Rape of a child constitutes any act of sexual penetration (per vaginam or other) by whatever means, of any person below 18 years of age against his or her will
0501 02	**Sexual harassment**
	Sexual harassment constitutes any threatening or disturbing behaviour or unwelcome sexual attention, requests for sexual favours and other verbal or physical conduct – other than penetration – typically in a work or educational environment
0501 02 01	Sexual harassment of an adult
0501 02 02	Sexual harassment of a child
0501 03	**Indecent exposure**
	Indecent exposure is the deliberate exposure by a person of a portion or portions of his or her body under the circumstances where a such exposure is likely to be seen as contrary to the standards of decency
0501 04	**Other forms of sexual assault**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0502 00	SEXUAL EXPLOITATION, PROSTITUTION AND PORNOGRAPHY
0502 01	**Sexual exploitation**
0502 01 01	Offences jointly identified as sexual exploitation of an adult
Article 1 and 2 of the 1949 UN Convention for the Suppression of the Traffic in Persons and of the	"Adult" means any person above 18 years of age; this offence is defined by following subcategories - Procuring, enticing or leading away, for purposes of prostitution, another person, even with the consent of that

Exploitation of the Prostitution of Others	person - Exploiting the prostitution of another person, even with the consent of that person - Keeping or managing, or knowingly financing or taking part in the financing of a brothel - Knowingly letting or renting a building or other place or any part thereof for the purpose of the prostitution of others
0502 01 02	Offences jointly identified as sexual exploitation of a child
Article 2 (a) and (b) Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	"Child" means any person below 18 years of age; Sexual exploitation of a child entails coercing or recruiting a child into prostitution or into participating in pornographic performances, or profiting from or otherwise exploiting a child for such purposes; - Where use is made of coercion, force or threats - Where money or other forms of remuneration or consideration is given as payment in exchange for the child engaging in sexual activities - Where abuse is made of a recognised position of trust, authority or influence over the child
0502 01 03	Other forms of sexual exploitation
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0502 02	**Soliciting by a prostitute**
	Soliciting by a prostitute shall mean offering of sexual activities in exchange for money or other forms of remuneration
0502 03	**Procuring for prostitution or sexual act**
	Procuring for prostitution or sexual act shall mean the offering of money or other forms of remuneration to an adult in exchange for engaging in sexual activities
0502 04	**Child Pornography**
Article 1 (b) Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Offences related to indecent images of children or "child pornography" shall mean pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);
0502 04 01	Offences jointly identified as Child Pornography
0502 04 01 01	Possessing child pornography
Article 3 (d) 2 Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography	Possessing pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged

(2004/68/JHA)	in the conduct mentioned in (i);
0502 04 01 02	Producing child pornography
Article 3 (a) Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Producing pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);
0502 04 01 03	Offering or making available of child pornography
Article 3 (c) Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Offering or making available pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);
0502 04 01 04	Distributing or transmitting child pornography
Article 3 (b) Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Distributing or transmitting pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i);
0502 04 01 05	Procuring child pornography for oneself or for another person
Article 3 (d) 1 Council framework decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (2004/68/JHA)	Procuring pornographic material that visually depicts or represents: (i) a real child involved or engaged in sexually explicit conduct, including lascivious exhibition of the genitals or the pubic area of a child; or (ii) a real person appearing to be a child involved or engaged in the conduct mentioned in (i); or (iii) realistic images of a non-existent child involved or engaged in the conduct mentioned in (i); for oneself or for another person
0502 04 02	Other offences related to child pornography
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0600 00 Open Category	**OFFENCES RELATED TO DRUGS OR PRECURSORS**
0600 01	**OFFENCES RELATED TO DRUGS**
0600 01 01	**Cultivation of opium poppy, coca bush or cannabis plant**
Article 2.1 (b) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on	Opium poppy means the plant of the species Papaver somniferum L. Coca bush means the plant of any species of the genus Erythroxylon. Cannabis plant means any plant of the genus Cannabis.

the constituent elements of criminal acts and penalties in the field of illicit drug trafficking and Article 1 (b), (c), (o) UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.	
0600 01 01 01	**Exclusively for own personal consumption**
Article 2.2 – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	The conduct is not included in the scope of the framework decision when it is committed by its perpetrators, exclusively for their own personal consumption as defined by national law
0600 01 01 02	**Not exclusively for own personal consumption**
0600 01 02	**Production**
Article 2.1 (a) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	Production includes manufacture, extraction and preparation
0600 01 02 01	**Exclusively for own personal consumption**
Article 2.2 – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	The conduct is not included in the scope of the framework decision when it is committed by its perpetrators, exclusively for their own personal consumption as defined by national law
0600 01 02 02	**Not exclusively for own personal consumption**
0600 01 03	**Transport**
Article 2.1 (a) – Council Framework Decision 2004/757/JHA of 25	Transport includes dispatch, dispatch in transit, importation and exportation Import means the entry into customs territory of the

October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking Article 2 (c) and (d) COUNCIL REGULATION (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors	Community, including temporary storage, the placing in a free zone or free warehouse, the placing under a suspensive procedure and the release for free circulation within the meaning of Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code Export means the departure from the customs territory of the Community, including the departure that requires a customs declaration and the departure after their storage in a free zone of control type I or free warehouse within the meaning of Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code
0600 01 03 01	**Exclusively for own personal consumption**
Article 2.2 – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	The conduct is not included in the scope of the framework decision when it is committed by its perpetrators, exclusively for their own personal consumption as defined by national law
0600 01 03 02	**Not exclusively for own personal consumption**
0600 01 04	**Distribution**
Article 2.1 (a) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking and article 1.2(b) COUNCIL DIRECTIVE 92/109/EEC of 14 December 1992 on the manufacture and the placing on the market of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances	Distribution or placing on the market means any supply against payment or free of charge to third parties including offer, offer for sale, delivery on any terms whatsoever, brokerage and sale.
0600 01 05	**Possession and purchase**
Article 2.1. (c) - Council Framework Decision	This category includes the possession and purchase of drugs with a view to conducting either the production, transport or

2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	distribution of drugs.
0600 01 05 01	**Exclusively for own personal consumption**
Article 2.2 – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	The conduct is not included in the scope of the framework decision when it is committed by its perpetrators, exclusively for their own personal consumption as defined by national law
0600 01 05 02	**Not exclusively for own personal consumption**
0600 01 06	**Other offences related to drugs**
0600 01 06 01	promoting the consumption of drugs
0600 01 06 02	knowingly letting or renting a building or other place where public have access for the purpose of consumption of drugs
0600 01 06 03	other
0600 02	**OFFENCES RELATED TO PRECURSORS AND OTHER ESSENTIAL CHEMICALS**
Article 1.2 – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	Precursors shall mean any substance scheduled in the Community legislation giving effect to the obligations deriving from Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988
0600 02 01	**Manufacture**
Article 2.1 (d) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking	This category refers to manufacture of precursors, knowing that they are to be used in or for the illicit production of drugs
0600 02 02	**Transport**
Article 2.1 (d) – Council Framework Decision	This category refers to transport of precursors, knowing that they are to be used in or for the illicit production of drugs

2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking Article 2 (c) and (d) COUNCIL REGULATION (EC) No 111/2005 of 22 December 2004 laying down rules for the monitoring of trade between the Community and third countries in drug precursors	Transport includes dispatch, dispatch in transit, importation and exportation Import means the entry into customs territory of the Community, including temporary storage, the placing in a free zone or free warehouse, the placing under a suspensive procedure and the release for free circulation within the meaning of Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code Export means the departure from the customs territory of the Community, including the departure that requires a customs declaration and the departure after their storage in a free zone of control type I or free warehouse within the meaning of Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code
0600 02 03	**Distribution**
Article 2.1 (d) – Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking and article 1.2(b) COUNCIL DIRECTIVE 92/109/EEC of 14 December 1992 on the manufacture and the placing on the market of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances	This category refers to distribution of precursors, knowing that they are to be used in or for the illicit production of drugs Distribution or placing on the market means any supply against payment or free of charge to third parties including offer, offer for sale, delivery on any terms whatsoever, brokerage and sale.
0600 02 04	**Other offences related to precursors**
0700 00 Open Category	**FIREARMS, THEIR PARTS AND COMPONENTS, AMMUNITION AND EXPLOSIVES,** *not committed or likely to be committed in the course of terrorist activities*
Article 3(a) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition	"Firearms" shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899; "Parts and components" shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any

	device designed or adapted to diminish the sound caused by firing a firearm; "Ammunition" shall mean the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorization in the respective State Party
0701 00	**ILLICIT MANUFACTURING FIREARMS**
Article 3(d) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the 2000 UN Palermo Convention	The offences related to the manufacturing or assembly of firearms, their parts and components or ammunition, listed in the Protocol supplementing the 2000 UN Palermo Convention, are used to introduce the sub categories in this section: (i) From parts and components illicitly trafficked; (ii) Without a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place; or (iii) Without marking the firearms at the time of manufacture, in accordance with article 8 of this Protocol (article 3d)The definition actually includes the subcategories of illicit trafficking)
0702 00	**FALSIFYING OR ILLICITLY ALTERING THE MARKING(S) ON FIREARMS**
Article 5(c) of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the 2000 UN Palermo Convention	Falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by article 8 of this Protocol. According to article 8 1. For the purpose of identifying and tracing each firearm, States Parties shall: (a) At the time of manufacture of each firearm, either require unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number, or maintain any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture; (b) Require appropriate simple marking on each imported firearm, permitting identification of the country of import and, where possible, the year of import and enabling the competent authorities of that country to trace the firearm, and a unique marking, if the firearm does not bear such a marking. The requirements of this subparagraph need not be applied to temporary imports of firearms for verifiable lawful purposes; (c) Ensure, at the time of transfer of a firearm from government stocks to permanent civilian use, the appropriate unique marking permitting identification by all States Parties of the transferring country. 2. States Parties shall encourage the firearms manufacturing industry to develop measures against the removal or alteration of markings
0703 00	**ILLICIT TRAFFICKING FIREARMS**
Article 3(e) of the Protocol against the Illicit	"Illicit trafficking" shall mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and

Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the 2000 UN Palermo Convention	components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in accordance with the terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol
0704 00	**UNAUTHORISED ACQUISITION**
0705 00	**UNAUTHORISED POSSESSION OR USE**
0706 00	**OTHER**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0800 00 Open Category	**HARMING THE ENVIRONMENT AND/OR PUBLIC HEALTH** *not committed or likely to be committed in the course of terrorist activities*
0801 00	**OFFENCES JOINTLY IDENTIFIED AS ENVIRONMENTAL OFFENCES**
0801 01	**Offences related to a quantity of materials or ionizing radiation**
Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to a quantity of materials or ionizing radiation which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals or plants. Including: - the unlawful discharge, emission or introduction of a quantity of materials or ionising radiation into air, soil or water
0801 02	**Offences related to waste**
Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to waste, including the supervision of the hereafter named operations and the after-care of disposal sites, and including actions taken as a dealer or a broker (waste management) which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water or to animals or plants: - the unlawful collection of waste - the unlawful transport, export or import of waste - the unlawful recovery of waste - the unlawful disposal of waste - the shipment of waste, where this activity falls within the scope of Article 2(35) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste and is undertaken in a non-negligible quantity, whether executed in a single shipment or in several shipments which appear to be linked;
0801 03	**Offences related to a plant in which a dangerous activity is carried out**

Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to a plant in which a dangerous activity is carried out and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants: - the unlawful operation of such a plant
0801 04	**Offences related to nuclear materials or other hazardous radioactive substances**
Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to nuclear materials or other hazardous radioactive substances which causes or is likely to cause death or serious injury to any person or substantial damage to the quality of air, the quality of soil, the quality of water, or to animals or plants. Including: - the unlawful production of nuclear materials or other hazardous radioactive substances - the unlawful processing, handling and use of nuclear materials or other hazardous radioactive substances - the unlawful holding and storage of nuclear materials or other hazardous radioactive substances - the unlawful transport, export or import of nuclear materials or other hazardous radioactive substances - the unlawful disposal of nuclear materials or other hazardous radioactive substances
0801 05	**Offences related to protected fauna and flora species**
Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to protected fauna and flora species or parts or derivatives thereof except for cases when the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species. Including: - the unlawful killing of protected wild fauna and flora species - the unlawful destruction of protected wild fauna and flora species - the unlawful possession of protected wild fauna and flora species - the unlawful taking of protected wild fauna and flora species - the unlawful trading of or in protected wild fauna and flora species
0801 06	**Offences related to habitats**
Article 2 (c) and 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to habitats, including - the unlawful significant deterioration of a habitat within a protected site 'habitat within a protected site' means any habitat of species for which an area is classified as a special protection area pursuant to Article 4(1) or (2) of Directive 79/409/EEC, or any natural habitat or a habitat of species for which a site is designated as a special area of conservation pursuant to Article 4(4) of Directive 92/43/EEC;
0801 07	**Offences related to ozone-depleting substances**

Article 3 - Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law	Offences related to ozone-depleting substances - the unlawful production of ozone-depleting substances - the unlawful importation or exportation of ozone-depleting substances - the unlawful placing on the market of ozone-depleting substances - the unlawful use of ozone-depleting substances
0801 08	**Offences related to illicit trafficking in hormonal substances and other growth promoters**
0802 00	OTHER OFFENCES AGAINST THE ENVIRONMENT OR HARMING PUBLIC HEALTH (NOT-DRUG RELATED)
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0802 01	**Offences related to consumer protection**
0802 02	**Other offences**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0900 00 Open Category	**OFFENCES AGAINST PROPERTY**
0901 00	THEFT
	Theft means depriving a person/ organisation of property with the intent to keep it.
0901 01	**Theft with violence or intimidation**
0901 02	**Theft without violence or intimidation**
0902 00	UNLAWFUL APPROPRIATION
	Unlawful appropriation is the act of unlawfully taking possession of or assigning purpose to properties or ideas
0902 01	**Racketeering and extortion**
	Racketeering unlawfully obtaining either money, property or services from a company through compelling a person or manipulating them to behave in an involuntary way (whether through action or inaction) by use of threats, intimidation or some other form of pressure or force, typically in exchange of the service of "protection" Extortion is the unlawfully obtaining either money, property or services from a person, entity, or institution, through compelling a person or manipulating them to behave in an involuntary way (whether through action or inaction) by use of threats, intimidation or some other form of pressure or force
0902 02	**Knowingly concealing or retaining property resulting from an offence**
Article 24 of the 2003 UN Merida Corruption Convention	Knowingly concealing or retaining property resulting from an offence: Article 24 of the 2003 UN Merida Corruption Convention, criminalizes, when committed intentionally, the

	concealment or continued retention of property when the person involved knows that such property is the result of any of the offences
0902 03	**Embezzlement, concealment of assets or unlawful increase in a company's liabilities**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Embezzlement (the act of dishonestly appropriating goods, usually money, by one to whom they have been entrusted); concealment of assets or unlawful increase in a company's liabilities, (this is an ECRIS category)
0902 04	**Unlawful dispossession**
	"Unlawful dispossession" means any interference with another person's property
0902 05	**Other forms of unlawful appropriation**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0903 00	**ILLICIT DEALING IN OR CONCEALING GOODS**
0903 01	**Illicit trafficking in cultural goods**
Annex to the Convention of 26 July 1995 on the establishement of a European police office and Article 2 (2) - Council Framework Decision of 13 june 2002 on the European arrest warrant and the surrender procedures between member states	Illicit trafficking in cultural goods including antiques and works of art, is a category in the Europol Annex and in article 2(2) of the European Arrest Warrant
0903 02	**Dealing in stolen goods**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Dealing in stolen goods is an ECRIS category
0903 03	**Other forms of illicit dealing in or concealing goods**
	Rest category, as the jointly identified forms an on offences type

	only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0904 00	**CRIMINAL DAMAGE**
Article 5 – Council framework decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties	This category is listed in article 5 of the said framework decision, without further explanation.
0904 01	**Destruction**
	Unlawful destruction of property; destruction is the act of damaging something beyond use or repair, including: - Arson is defined as the maliciously, voluntarily, and wilfully setting fire to the building, buildings, or other property of another, or of burning one's own property for an improper purpose, as to collect Insurance - Explosion is a sudden increase in volume and release of energy in an extreme manner, usually with the generation of high temperatures and the release of gases. An explosion creates a shock wave
0904 02	**Sabotage**
	Sabotage is a deliberate action of subversion, obstruction, disruption, and/or destruction
0904 03	**Smearing**
	This includes for example graffiti
0904 04	**Other forms of criminal damage**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0905 00	**CORRUPTION**
Annex to the Convention of 26 July 1995 on the establishment of a European police office	This category is listed without further explanation.
0905 01	**Offences jointly defined as corruption**
0905 01 01	Active corruption in the public sector involving a EU public official
Article 3.1 of the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of member states of the European Union	The deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption. EU public official (community official) shall mean any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European

	Communities or the Conditions of Employment of other servants of the European Communities; or any person seconded to the European Communities by the member states or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants
0905 01 02	Passive corruption in the public sector involving a EU public official
Article 2.1 of the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of member states of the European Union	The deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute passive corruption. EU public official (community official) shall mean any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities; or any person seconded to the European Communities by the member states or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants
0905 01 03	Active corruption in the private sector
Article 2.1(a) of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector	promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties
0905 01 04	Passive corruption in the private sector
Article 2.1(b) of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector	directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties
0905 02	**Other forms of corruption**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0906 00	**MONEY LAUNDERING**
	"Money laundering" or laundering of proceeds of crime "proceeds", consists of any economic advantage from criminal offences.
0906 01	**Offences jointly identified as Money Laundering**
0906 01 01	The conversion or transfer of property

Article 6(1) of the the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	The illicit conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions
0906 01 02	The illicit concealment or disguise of property related information
Article 6(1) of the the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds
0906 01 03	The illicit acquisition, possession or use of laundered property
Article 6(1) of the the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	The acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds.
0906 02	**Other forms of Money Laundering**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0907 00	**VIOLATON OF COMPETITION RULES**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Violation of competition rules is an ECRIS category
0908 00	**FRAUD AND SWINDLING**
Annex to the Convention of 26 July 1995 on the Establishement of a European police office	This category is listed without further explanation.
0908 01	**Offences jointly identified as fraud and swindling**
0908 01 01	Counterfeiting and piracy products
Annex to the Convention of 26 July 1995 on the Establishement of a European police office	This category is listed without further explanation.

0908 01 02	Forgery (i.e. Counterfeiting) and trafficking of administrative documents
Article 2 (2) - Council Framework Decision of 13 june 2002 on the European arrest warrant and the surrender procedures between member states	Forgery (i.e. Counterfeiting) of administrative documents and trafficking therein, includes: - Possession of a devise for the forging of public or administrative documents - Forging (i.e. counterfeiting) of public or administrative documents - The supply or acquisition of a forged public or administrative document - Using forged public or administrative documents - Trafficking in forged administrative documents
0908 01 03	Forgery (i.e. Counterfeiting) of means of payment
Article 40(7) – Convention Implementing The Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders	Listed as an offence category, without further explanation.
0908 01 03 01	Forgery (i.e. Counterfeiting) of cash means of payment
Article 3 - Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro	Cash means of payment or currency means paper money (including banknotes) and metallic money, the circulation of which is legally authorised including euro banknotes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) 974/98) Forgery (i.e. Counterfeiting) of cash means of payment includes: - Any fraudulent making or altering of currency, whatever means are employed ("currency" means paper money (including banknotes) and metallic money, the circulation of which is legally authorised including euro banknotes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) 974/98) - The fraudulent uttering of counterfeit currency ("currency" means paper money (including banknotes) and metallic money, the circulation of which is legally authorised including euro banknotes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) 974/98) - The import, export, transport, receiving, or obtaining of counterfeit currency with a view to uttering the same and with knowledge that it is counterfeit; - The fraudulent making, receiving, obtaining or possession of (i) instruments, articles, computer programs and any other means peculiarly adapted for the counterfeiting or altering of currency, or holograms or other components of currency which

	serve to protect against counterfeiting. ("currency" means paper money (including banknotes) and metallic money, the circulation of which is legally authorised including euro banknotes and euro coins, the circulation of which is legally authorised pursuant to Regulation (EC) 974/98)
0908 01 03 02	Forgery (i.e. Counterfeiting) of non-cash means of payment
Article 1 - Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment	"Non-cash payment instrument" shall mean a corporeal instrument, other than legal tender (bank notes and coins), enabling, by its specific nature, alone or in conjunction with another (payment) instrument, the holder or user to transfer money or monetary value, as for example credit cards, euro cheque cards, other cards issued by financial institutions, travellers' cheques, euro cheques, other cheques and bills of exchange, which is protected against imitation or fraudulent use, for example through design, coding or signature; Forgery (i.e. Counterfeiting) of non-cash means of payment is defined by following subcategories: - The fraudulent uttering of a payment instrument - Receiving, obtaining, transporting, sale or transfer to another person or possession of a stolen or otherwise unlawfully appropriated, or of a counterfeited payment instrument in order for it to be used fraudulently - Performing or causing a transfer of money or monetary value and thereby causing an unauthorised loss of property for another person, with the intention of procuring an unauthorized economic benefit for the person committing the offence or for a third part - The fraudulent making, receiving, obtaining, sale or transfer to another person or possession of (i) instruments, articles, computer programmes and any other means peculiarly adapted for the commission of any of the offences described under Article 2(b);
0908 01 04	Fraud affecting the financial interests of the European Communities
Article 1 of the Convention of 26 July 1995 on the protection of the European Communities' Financial Interests	Fraud affecting the financial interests of the European Communities, includes: Expenditure fraud meaning: - The use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities - The non-disclosure of information in violation of a specific obligation, with the same effect - The misapplication of such funds for purposes other than those for which they were originally granted Revenue fraud means: - The use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal

	diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities - The non-disclosure of information in violation of a specific obligation, with the same effect - The misapplication of a legally obtained benefit, with the same effect
0908 02	**Other forms of fraud and swindling**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0908 02 01	Tax offences
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	A tax is a financial charge or other levy imposed on an individual or a legal entity by a state or a functional equivalent of a state. "Tax offences" an ECRIS category.
0908 02 02	Social Security or Family Benefit Fraud
0908 02 03	Custom offences
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Customs is an authority or agency in a country responsible for collecting and safeguarding customs duties and for controlling the flow of goods including animals, personal effects and hazardous items in and out of a country (this is an ECRIS category)
0908 02 04	Fraudulent insolvency
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Insolvency exists for a person or organization when total financial liabilities exceed total financial assets (this is an ECRIS category)
0908 02 05	Other
	Rest category, as the jointly identified forms an on offences type

	only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0909 00	**OFFENCES AGAINST INFORMATION SYSTEMS**
0909 01	**Offences jointly identified as offences against information systems**
0909 01 01	Offences against the confidentiality, integrity and availability of computer data and systems
Article 2 of the 2001 CoE Cybercrime Convention	Offences against the confidentiality, integrity and availability of computer data and systems: "computer system" means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data; "computer data" means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function; "service provider" means any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and any other entity that processes or stores computer data on behalf of such communication service or users of such service. "traffic data" means any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service, - Illegal Access: the access to the whole or any part of a computer system without right - Illegal interception: the interception without right, made by technical means, of non-public transmissions of computer data to, from or within a computer system, including electromagnetic emissions from a computer system carrying such computer data - Data interception: the damaging, deletion, deterioration, alteration or suppression of computer data without right - System interference: the serious hindering without right of the functioning of a computer system by inputting, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data - Misuse of devises: committing intentionally and without right: (a) the production, sale, procurement for use, import, distribution or otherwise making available of a device, including a computer program, designed or adapted primarily for the purpose of committing any of the above mentioned; or a computer password, access code, or similar data by which the whole or any part of a computer system is capable of being accessed, with intent that it be used for the purpose of committing any of the above mentioned offences; and (b) the possession of an item referred to in paragraphs a.i or ii above, with intent that it be used for the purpose of committing any of the above mentioned offences

0909 01 02	Computer-related offences
	Computer-related offences include - the input, alteration, deletion, or suppression of computer data, resulting in inauthentic data with the intent that it be considered or acted upon for legal purposes as if it were authentic, regardless whether or not the data is directly readable and intelligible - committing intentionally and without right, the causing of a loss of property to another person by: a) any input, alteration, deletion or suppression of computer data, b) any interference with the functioning of a computer system, with fraudulent or dishonest intent of procuring, without right, an economic benefit for oneself or for another person
0909 01 03	Offences related to infringements of copyright and related rights
0909 01 04	Production, possession or trafficking in computer devices or data enabling commitment of computer related offences
0909 02	**Other forms of offences against information systems**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
0910 00	**OTHER OFFENCES AGAINST PROPERTY**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
1000 00 Open Category	**OFFENCES AGAINST LIFE, LIMB AND PERSONAL FREEDOM,** *not committed or likely to be committed in the course of terrorist activities* and *other than offences against the state, nation, state symbol or public authority*
1001 00	**CAUSING DEATH**
1001 01	**Intentional**
Derived from European SourceBook	Intentional homicide means intentional killing of a person. Where possible, the figures include assault leading to death, euthanasia, infanticide, but exclude assistance with suicide
1001 01 01	not further specified
1001 01 02	causing death at the request of the victim
	Euthanasia is causing death at the request of the victim
1001 01 03	causing death of the own child during or immediately after birth
	Infanticide is causing death of the own child during or immediately after birth
1001 01 04	offences related to suicide
1001 01 05	illegal abortion
	Illegal abortion is the removal or expulsion of an embryo or fetus from the uterus, resulting in or caused by its death
1001 02	**Unintentional**

	Unintentional killing (manslaughter)
1002 00	**CAUSING PSYCHOLOGICAL AND/OR BODILY INJURY**
1002 01	**Torture**
Article 1 of the UN 20 December 1984 Convention against Torture	"torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
1002 02	**Causing psychological and bodily injury, *other than torture***
1002 02 01	Causing grievous bodily injury
1002 02 02	Causing minor bodily injury
1002 02 03	Threatening behaviour
1002 02 04	Other
1003 00	**FAILURE TO OFFER AID**
	Failure to offer aid excludes torture and failure to stop after a road accident
1004 00	**EXPOSING TO DANGER OF LOSS OF LIFE OR GRIEVOUS BODILY INJURY**
	Exposing to danger of loss of life or grievous bodily injury includes neglect or desertion of a child or a disabled person
1005 00	**KIDNAPPING, ILLEGAL RESTRAINT AND HOSTAGE-TAKING**
Annex to the Convention of 26 july 1995 on the establishment of a European police office	Kidnapping or hostage taking; Kidnapping is the taking away or aspiration of a person against the person's will; Hostage-taking is the seizing of a person in order to compel another party such as a relative, employer or government to act, or refrain from acting, in a particular way, often under threat of serious physical harm to the hostage(s) after expiration of an ultimatum; Illegal restraint is the holding of the person in false imprisonment, a confinement without legal authority
1006 00	**INSULT, SLANDER AND DEFAMATION**
	Insults is an expression, statement or behaviour that is considered degrading; Defamation or slander is the communication of a statement that makes a false claim, expressively stated or implied to be factual, that may give an individual, business, product, group, government or nation a negative image
1007 00	**BREACH OF PRIVACY, *other than through cybercrime***

1100 00 Open Category	OFFENCES AGAINST THE STATE, PUBLIC ORDER, COURSE OF JUSTICE OR PUBLIC OFFICIALS
1101 00	OFFENCES AGAINST THE STATE AND/OR PUBLIC AUTHORITIES
1101 01	**Attempt against life or health of the head of State**
1101 02	**Insult of the State, nation or State symbols**
1101 03	**Insult or resistance to a representative of public authority**
1101 04	**Assault on a representative of public authority**
1101 05	**Unlawful impersonation of a person or an authority**
1101 06	**Espionage**
	Espionage is the obtaining of information that is considered secret or confidential without the permission of the holder of the information
1101 07	**High treason**
	Criminal disloyalty to one's country constitutes high treason
1101 08	**Offences related to elections and referendum**
	Offences related to elections and referendum
1101 09	**Obstructing of public tender procedures**
	Obstructing of public tender procedures to generate competing offers from different bidders looking to obtain an award of business activity in works, supply, or service contracts
1101 10	**Obstructing or perverting the course of justice, making false allegations, perjury**
	Obstructing or perverting the course of justice, making false allegations, perjury
1101 11	**Abuse of function**
1101 12	**Other offences against the state and/or public authorities**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
1102 00	OFFENCES AGAINST PUBLIC PEACE/PUBLIC ORDER
1102 01	**Violence during sports events**
Article 5 – Council framework decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties	This category is listed in article 5 of the said framework decision, without further explanation
1102 02	**Violence during international conferences**
1102 03	**Public abuse of alcohol or drugs, other than related to road traffic regulations**
1102 04	**Offences related to illegal gambling**

1102 05	**Disturbing public order through racism and xenophobia**
1102 05 01	Publicly inciting to racist or xenophobic violence or hatred
Article 1 – Council Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law	Publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin includes: - Publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin by public dissemination or distribution of tracts, pictures or other material - Publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin through other means
1102 05 02	Denial, gross minimisation, approval or justification of genocide or crimes against humanity
Article 1 – Council Framework Decision of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law	Denial, gross minimisation, approval or justification of genocide or crimes against humanity
1102 05 03	Other offences disturbing public order through racism and xenophobia
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
1200 00 Open Category	**OFFENCES AGAINST LABOUR LAW**
1201 00	**UNLAWFUL EMPLOYMENT**
1201 01	**Unlawful employment *of an EU national***
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Unlawful employment of an EU national, this distinction is made by the ECRIS classification system
1201 02	**Unlawful employment *of a third country national***
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the	Unlawful employment of a third country national, this distinction is made by the ECRIS classification system

European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	
1202 00	**OFFENCES RELATING TO REMUNERATION INCLUDING SOCIAL SECURITY CONTRIBUTIONS**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Offences relating to remuneration including social security contributions, is an ECRIS category.
1203 00	**OFFENCES RELATING TO WORKING CONDITIONS, HEALTH AND SAFETY AT WORK**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Offences relating to working conditions, health and safety at work, is an ECRIS category.
1204 00	**OFFENCES RELATING TO ACCESS TO OR EXERCISE OF A PROFESSIONAL ACTIVITY**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Offences relating to access to or exercise of a professional activity, is an ECRIS category.
1205 00	**OFFENCES RELATING TO WORKING HOURS AND REST TIME**, *other than road traffic offences*
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information	Offences relating to working hours and rest time, other than those in road traffic regulations, is an ECRIS category

System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	
1206 00	**OTHER OFFENCES AGAINST RIGHTS OF THE EMPLOYEES**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy (e.g. the right to form and join trade unions)
1300 00 Open Category	**MOTOR VEHICLE CRIME AND OFFENCES AGAINST TRAFFIC REGULATIONS,** ***other than theft, misappropriation and trafficking in stolen vehicles***
Article 5 – Council framework decision of 24 February 2005 on the application of the principle of mutual recognition to financial penalties and 4th indent of the Annex to the Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office	Conduct which infringes road traffic regulations include breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods. "Vehicle" shall mean any motor vehicle, trailer or caravan as defined in the provisions relating to the Schengen Information System (SIS)
1301 00	**DANGEROUS DRIVING**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Dangerous driving is an ECRIS category and includes: - Driving over the speed limit - Driving under the influence of alcohol or narcotic drugs - Driving without seat belts or child seat
1302 00	**DRIVING WITHOUT A LICENCE OR WHILE DISQUALIFIED**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Driving without a licence or while disqualified is an ECRIS category
1303 00	**FAILURE TO STOP AFTER A ROAD ACCIDENT**

Article 41(4) – Convention Implementing The Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders	Failure to stop after a road accident which has resulted in death or serious injury
1304 00	**AVOIDING A ROAD CHECK**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Avoiding a road check is an ECRIS category
1305 00	**OFFENCES RELATED TO ROAD TRANSPORT**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Offences related to road transport, including breaches of regulations pertaining to driving hours and rest periods and regulations on hazardous goods
1306 00	**OTHER OFFENCES RELATED TO VEHICLES AND ROAD TRAFFIC REGULATIONS**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
1400 00 Open Category	**OFFENCES AGAINST MIGRATION LAW**
Article 2, 1 (b) of Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council	"Immigration" means the action by which a person establishes his or her usual residence in the territory of a member state for a period that is, or is expected to be, of at least 12 months, having previously been usually resident in another member state or a third country. "Emigration" means the action by which a person, having previously been usually resident in the territory of a member state, ceases to have his or her usual residence in that member state for a period that is, or is expected to be, of at least 12 months;

Regulation (EEC) No 311/76 on the compilation of statistics	
1401 00	**OFFENCES JOINTLY IDENTIFIED AS OFFENCES AGAINST MIGRATION LAW**
1401 01	**Unauthorised entry, transit and/or residence**
Article 3(b) of the Council Decision of 24 July 2006 Article 5 Council Regulation (EC) No 562/2006 of the European Council and of the European Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders.	Illegal (unauthorised) entry' is defined as crossing borders without complying with the necessary requirements for legal entry into the receiving State. It includes: - Unauthorised entry, transit and/or residence for fictitious scientific research - Unauthorised entry, transit and/or residence for fictitious studies - Unauthorised entry, transit and/or residence for fictitious pupil exchange - Unauthorised entry, transit and/or residence for fictitious unremunerated training - Unauthorised entry, transit and/or residence for fictitious voluntary service - Unauthorised entry, transit and/or residence for fictitious family reunification - family reunification' means the entry into and residence in a member state by family members of a third country national residing lawfully in that member state in order to preserve the family unit, whether the family relationship arose before or after the resident's entry; - Unauthorised entry, transit and/or residence for fictitious pursuit of activities as self-employed person - "Activity as a self-employed person` means any activity carried out in a personal capacity or in the legal form of a company or firm within the meaning of the second paragraph of Article 58 of the EC Treaty without being answerable to an employer in either case
1401 02	**Facilitation of unauthorised entry, transit and residence**
Article 1 of the Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence	Facilitation of unauthorised entry, transit and residence includes: - Assisting a person who is not a national of a member state to enter, or transit across, the territory of a member state in breach of the laws of the State concerned on the entry or transit of aliens, either in order to obtain a financial or other material benefit (i.e. smuggling of migrants), or irrespective of a financial or other material benefit (e.g. marriage of convenience: this is a marriage contracted for reasons other than the reasons of relationship, family, or love. Instead, such a marriage is orchestrated for personal gain or some other sort of strategic purpose, such as immigration.) - Intentionally assisting a person – for financial gain - who is not a national of a member state to reside within the territory of a member state in breach of the laws of the State concerned on the residence of aliens

1404 00	**OTHER OFFENCES RELATED TO IMMIGRATION/ALIEN LAWS**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy
1500 00 Open Category	**OFFENCES RELATED TO FAMILY LAW**
1501 00	**OFFENCES RELATED TO FAMILY LAW,** *not further specified*
	Rest category: included to allow member states to provide additional information if they collect data on other types of offences.
1502 00	**BIGAMY**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Bigamy is the act or condition of a person marrying another person while still being lawfully married to a second person. Bigamy is an ECRIS category.
1503 00	**FAMILY ABANDONMENT BY EVADING THE ALIMONY OR MAINTENANCE OBLIGATION**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Family Abandonment via evading the alimony or maintenance obligation, is an ECRIS category.
1504 00	**REMOVAL OF A CHILD OR FAILURE TO COMPLY WITH AN ORDER TO PRODUCE A CHILD**
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Failure to comply with an order to produce a minor or removal of a minor, is an ECRIS category

1600 00 0pen Category	OFFENCES AGAINST MILITARY OBLIGATIONS
The ECRIS Classification is attached to the Proposal for a Council Decision on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA	Offences against military obligations is an ECRIS category.

Cross-border Recidivism: fact or fiction? Evaluating the supporting policy triangle

Submitted to Punishment and Society
Submitted on 12 February 2012
Accepted for review on 27 February 2012

Abstract

From 15 August 2010 onwards *cross-border recidivism* is supposed to be a fact in the European Union for member states agreed that during the sentencing stage foreign convictions will generate an effect similar to national convictions. However, theory and practice do not always correspond. This article demonstrates that the prior conviction policy – which forms the base of cross-border recidivism – is inextricably linked not only to the approximation policy (to the extent that taking account of foreign convictions is limited along a double criminality requirement), but also to the information exchange policy (because foreign convictions can only be taken into account to the extent information is available). Therefore these three policy domains form a so-called policy triangle that supports cross-border recidivism. Analysis reveals that the policy triangle is anything but balanced and the European policy maker failed to appreciate the links between those three policy domains. The prior conviction policy insufficiently safeguards the approximation acquis, the information exchange policy does not take account of the needs of a smooth functioning prior conviction policy, amongst others because it does not reflect the approximation acquis in the architecture of the criminal records databases nor in the templates supporting the information exchange. Therefore, in practice, cross-border recidivism is far from reality.

Key words: double criminality, recidivism, prior convictions, criminal records, approximation

Cross-border Recidivism: fact or fiction? Evaluating the supporting policy triangle

1 Introduction

1.1 Birth of cross-border recidivism

For the purpose of this article cross-border recidivism refers to '*crossing the border'* in the sentencing stage and take account of not only national but also foreign convictions. Though record-based sentencing is still subject to debate amongst criminological theorists (Von Hirsch 2002; Ashworth 2010), a scan of the existing criminal justice provisions leads to the conclusion that having proper information on a person's criminal track record is important for the application of several criminal law concepts during the pre-trial, trial and even the post-trial stage. At the pre-trial stage, the existence of prior convictions can influence amongst others the qualification of the facts, the application of the *ne bis in idem* principle and the decision on provisional detention. At the trial stage, the existence of previous convictions can influence amongst others both the type of the sanction as it may restrict the use of suspended sentences as well as the level of the sanction as a result of accumulation or confusion with the previous sanction. At the post-trial stage, the existence of prior convictions can influence amongst others the application of the rules governing the execution of the sentence in that it may reduce the possibility to obtain adjustments of the sanction or be allowed early release. The provisions that govern the effect of prior convictions in the course of new criminal proceedings are referred to as 'prior conviction provisions'. For the purpose of this article, the prior conviction provisions governing the fate of foreign convictions during the sentencing stage are singled out as a case study.

As a consequence of the increased mobility of the European citizens and thus the increased likeliness that a person subject to a criminal proceeding has previously been convicted in a member state other than the now proceeding member state, questions arise with respect to the fate of those *foreign* prior convictions when applying prior conviction provisions. From 15 August 2010 onwards that question seems to be answered as *cross-border recidivism* is supposed to be a fact in the European Union. With the adoption of Framework Decision 2008/675/JHA of 24 July 2008 (abbreviated to FD Prior Convictions)[355]

[355] On 15 August 2010, the implementation deadline for the Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220 of 15.08.2008 (abbreviated to FD Prior

the member states agreed that during the sentencing stage foreign convictions will generate an effect similar to national convictions. Cross-border recidivism is not an EU invention, but – as announced in the 2000 Programme of Measures[356] – the logical next step considering the pre-existing policy at Council of European level. Via Art. 56 of the 1970 European Convention on the International Validity of Criminal Judgements[357], the European states had already taken the commitment to *enable* courts to take a foreign prior conviction into consideration. States should legislate so that judges are able to give foreign prior convictions *all or some of the effects* given to national convictions. Even though politically it was decided that Art. 56 of the Council of Europe Convention should be interpreted to mean that a complete refusal by a state to take account of foreign prior convictions was excluded[358], the wording of that article does not introduce any formal obligation with respect to foreign prior convictions. Such a formal obligation is now included in FD Prior Convictions, making cross-border recidivism an irreversible part of the European criminal justice acquis.

1.2 Cross-border recidivism & double criminality

Cross-border recidivism is not unconditional. As soon as the criminal codes of different member states come into contact with each other, questions arise on the way to cope with the differences between them. With respect to cross-border recidivism, questions will arise with respect to the fate of foreign convictions for which the underlying behaviour would not have constituted an offence when committed in the territory of another member state. It was therefore expected that within those recidivism provisions, double criminality filters would be identified. A lot of member states make the application of their recidivism provisions either explicitly or implicitly dependent on a double criminality requirement and in doing so legislate that convictions will only be taken into account to the extent the underlying behaviour would also have constituted an offence when committed in the jurisdiction of the sentencing state. So-called

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Convictions) passed. Though Art. 3 FD Prior Convictions entails a broad range of provisions that require information on the person's prior convictions (See more elaborately Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, COM (2005) 91 final of 17.3.2005 included in Doc 7645/05, COPEN 60 of 30.3.2005) for the purpose of this article, the recidivist sentencing provisions are singled out as a case study.

[356] Measure 2 in Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 21 of 15.1.2001.

[357] European Convention on the International Validity of Criminal Judgements, ETS n°70 of 28.5.1970.

[358] Explanation to Art. 56 – Explanatory Report to the European Convention on the International Validity of Criminal Judgements. ETS n°70 of 28.5.1970.

further reaching foreign convictions for which the underlying behaviour does not pass the double criminality test, are excluded from the scope of cross-border recidivism. Firstly, an *explicit exclusion* of further reaching foreign convictions can be found, amongst others[359], in Art. 75 (3) of the Portuguese criminal code which stipulates that *"sentences passed by foreign courts count for recidivism as stated in the above articles, provided that the act constitutes a crime under Portuguese law."* Similarly, Section 143 (6) (a) of the UK's Criminal Justice Act 2003 as amended in 2009 only considers foreign convictions to be relevant *"if the offence would constitute an offence under the law of any part of the United Kingdom if it were done in that part at the time of the conviction of the defendant for the current offence"*. Secondly, *an implicit exclusion* can be found in sentencing provisions that require a specifically detailed similarity between the previous and new offence. Similarity can refer to offences included in the same chapter of the criminal code, as can be found in Art. 66 (5) of the Spanish criminal code. The application thereof will filter out further reaching foreign convictions. Similarity can also be clarified listing the provisions of the criminal code that are deemed to describe similar offences. Art. 132-16 to Art. 132-16-2 of the French criminal code list the offences that are considered to be the same for the application of the rules governing recidivism. Finally, similarity can also be limited to the exact same offence, as can be found in Art. 204 (4) of the Romanian criminal code which relates to a specific type of trafficking in human beings and its (5) clarifies that *"if the act is committed repeatedly, the maximum penalty shall be increased by 2 years*". The same is true for Art. 562 of the Belgian criminal code. For those sentencing provisions, interpretation is clear, further-reaching foreign convictions are filtered out and will not be taken into account.

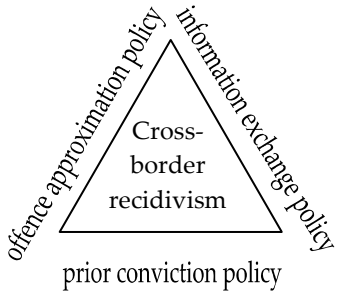
On the other hand, some sentencing provisions (implicitly) open the door for taking account of further reaching foreign convictions. It be noted therefore, that double criminality filtering to limit the effect of cross-border recidivism is not a general practice in all 27 member states. Firstly, some criminal codes require *similarity* between the offences, without further clarification. Amongst others, this requirement can be found in Art. 28 of the Bulgarian criminal code which stipulates that aggravating effect is linked to being "*convicted with a sentence that has entered into force for another similar crime"*. Similar wording can be found in Chapter 6, Section 5 (1) 5 of the Finnish criminal code and Art. 64 of the Polish criminal code. Member states that have introduced such a very broad similarity concept, can use that broadness to allow the taking into account of further

[359] For the purpose of this article, the recidivism provisions of each of the 27 member states were thoroughly reviewed and compared. However, the inclusion of references to provisions in the national criminal codes to serve as examples was preferred over an exhaustive overview of all provisions. Though necessary for the underlying analysis, the line of argumentation does not require such exhaustiveness.

reaching foreign convictions. It can be argued that even when the constituent elements of the underlying offences do not have a national counterpart and the behaviour would not have constituted an offence in their jurisdiction, the offences may still be *similar enough*. The same is true for member states that have clarified the meaning of similarity in a very broad fashion. Art. 43 b of the Dutch criminal code lists the provisions which are to be considered as similar for the application of the recidivism provisions. This provision is written in a very open fashion stating that *at least those offences* should be considered similar, which leaves the door open for an interpretation that allows taking account of further reaching foreign convictions.

1.3 Cross-border recidivism & the policy triangle

The EU's prior conviction policy should not be considered a stand-alone policy. Cross-border recidivism calls for the combination of three policy domains and in doing so the creation of a policy triangle as shown in the figure below.



The first side of the policy triangle consists of the EU's prior conviction policy itself. As symbolised by the birth of cross-border recidivism, in an evolving European Union in which a single area of freedom, security and justice is being installed, limiting the scope of prior conviction provisions to national convictions only is outdated.

The second side of the policy triangle is the result of the identification of double criminality filters in recidivism provisions. Double criminality filtering aims at ensuring that foreign convictions for which the underlying behaviour would not have constituted an offence in the sentencing member state, are not taken into account. To a large extent, member states have the autonomy to decide what behaviour constitutes an offence and what behaviour does not. From that perspective to a large extent, member states have the autonomy to decide which foreign convictions will be taken into account and which foreign

convictions are filtered out for double criminality reasons. However, in relation to some behaviour, member states have lost that autonomy following the adoption of an approximation instrument, i.e. an instrument in which member states commit themselves to ensuring that certain behaviour constitutes an offence in their jurisdictions. The entirety of these instruments forms the approximation acquis which symbolises the loss of the member states autonomy to individually decide whether behaviour should constitute an offence or not.[360] Inevitably, double criminality filtering links in with the EU's approximation acquis, for filtering will not be acceptable in relation to approximated offences. Member states will not be allowed to raise double criminality based objections in relation to behaviour for which they have agreed to make it a criminal offence across the EU. The acquis formed through the approximation policy therefore comprises the second side of the policy triangle.

The third side of the policy triangle is made up of the information exchange policy. Foreign convictions cannot be taken into account of no adequate criminal records information is available. Furthermore, the exchange policy will need to be tailored to match the needs of the prior conviction policy as well as the approximation policy; It needs to be tailored to facilitate double criminality filtering to the extent that filtering is accepted in view of the approximation acquis. Therefore, the level of detail in the criminal records policy will need to be evaluated in light of the conclusions with respect to the acceptability of double criminality filtering.

The combination of these three policy domains leads to the creation of a policy triangle that needs to be well balanced to ensure the viability of cross-border recidivism in the national sentencing practices.

2 Acceptability of double criminality filtering

To be able to set the base of the policy triangle, an analysis is required to decide whether double criminality filters are still acceptable or outdated as a limit to the application of a concept such as cross-border recidivism in an evolving European Union. The question arises whether the decision included in Recital 6 FD Prior Convictions that the framework decision does not entail an obligation to attach legal consequences to a foreign conviction if the underlying behaviour would not have been an offence in the prosecuting member state and therefore *"a national conviction would not have been possible regarding the fact"* needs

[360] For reasons of clarity, it must be noted that the existing approximating framework decisions have been adopted with unanimity and therefore member states have unanimously accepted that they will no longer have the autonomy to individually change the criminal nature of the identified behaviour in the future.

to be supported and in doing so allow double criminality filtering. This analysis can be done both from a theoretical as well as from a policy consistency perspective.

2.1 Theoretical perspective

Firstly, if double criminality filtering proves inacceptable from a theoretical perspective and member states are willing to accept the consequences thereof and thus adapt their national recidivism provisions, the hypothesis of the existence of a policy triangle would no longer stand. Therefore it needs to be evaluated whether there are theoretical containdications against the use of double criminality filtering when taking account of a person's prior convictions during the sentencing stage. Amongst the sentencing theorists three big theoretical schools can be distinguished.

As a first theoretical school, there is what Roberts calls the Exclusionary School (2010) or what Ashworth calls flat-rate sentencing, in which sentencing is governed by the crime and not the offenders prior record (2010). Because prior convictions should not affect sentencing in the first place, it is only logical that this school has not developed an argumentation with respect to the fate of further reaching foreign convictions. They list several reasons why recidivism should not affect the sentencing of new offences. Firstly, the deserved punishment of the previous conviction has been suffered and debt has been paid to society (Bagaric 2000) and secondly, it is argued that punishment should fit the crime and not the criminal (Fletcher 2000). Thirdly, recidivism premiums are said to be inconsistent with the absorption theories in multi-count cases (Tonry 2010). The argumentation upheld by the followers of this school is completely opposite the content of the existing prior conviction provisions found in the national codes of the member states and can therefore be of no use to determine the acceptability of double criminality filtering and therefore the fate of further reaching foreign convictions.

As a second theoretical school, there is the First Offender School, that argues that not so much the recidivist deserves attention, but rather the focus should be on first offenders, who deserve a mild penalty regime. In doing so they introduce the technique of the progressive loss of mitigation (Ashworth 2010; Roberts 2010), which consists of two parts. Firstly, *first offenders* should receive a reduction of their penalty and secondly, *second and subsequent offenders* should progressively loose that mitigation. Because it is not clear whether this progressive loss of mitigation is linked to the rule breaking behaviour or the return to court, the impact on double criminality filtering is unclear. Furthermore, both could be interpreted either in favour or against double

criminality filtering. If linked to rule breaking behaviour, it is still unclear whether it is linked to breaking any rule anywhere, or breaking a rule (also) upheld by the sentencing state. If linked to the return to court, it is unclear whether a previous visit to any court is taken into consideration or only a previous visit to a court in the sentencing state. The theoretical framework developed by the First Offender School can therefore be of no use to decide that double criminality filtering is unacceptable.

As a third and final theoretical school, there is the Recidivist Premium School, that argues that recidivism warrants the imposition of a penalty that exceeds the initially foreseen maximum (Lee 2010). They argue that firstly, repeat offenders are aware of the consequences of their acts and secondly a series of offences causes greater social harm than the harm associated with each individual offence. This latter argument is used as a justification for a true aggravation of the sentence and thus increase of the maximum. Here too, in absence of a clear position on the fate of further reaching foreign convictions, the argumentation can be interpreted in various ways. Stipulating that a person is aware of the consequences of his acts can be read as precluding the use of foreign convictions altogether because a foreign conviction only makes him aware of the consequences attached to the behaviour in another jurisdiction and in no way prepares him for the consequences in the own jurisdiction. Less strict, it can be interpreted as suggesting that a recidivist premium can only be applied when the person involved commits the exact same behaviour which warrants the use of a double criminality filter. More broadly however, it can be read as being aware that breaking the law is not without consequences which does not require a double criminality filter at all. Therefore also this last theoretical school can be of no use as a basis to preclude double criminality filtering when taking account of foreign convictions.

As a result, from a theoretical perspective Recital 6 FD Prior Convictions justly stipulates that the framework decision does not entail *an obligation* to attach legal consequences to a foreign conviction if the underlying behaviour would not have been an offence in the prosecuting member state and therefore *"a national conviction would not have been possible regarding the fact"*. There is no theoretical reason to decide that double criminality filtering is an unacceptable limit to cross-border recidivism.

2.2 Consistency perspective

Secondly, questions can arise whether a decision on the acceptability of double criminality filtering in a cross-border recidivism context needs to mirror the position of double criminality in other European policy areas such as

international cooperation in criminal matters; whether the acceptance of double criminality filtering in a cross-border recidivism context would be inconsistent when compared to the acceptance of double criminality filtering in other contexts.

A thorough review of the position of double criminality in international cooperation instruments learns that filtering cannot be characterised as a general practice, though a number of international cooperation mechanism are limited along a double criminality requirement (Jareborg 1989; De Bondt 2012). In general, if cooperation entails only a small contribution to a criminal proceeding member states are usually more willing to cooperate, when compared to their willingness with respect to a type of cooperation that entails taking over a proceeding or executing foreign convictions. From that perspective, taking account of a person's prior conviction when deciding on the sentence to be attached to new facts definitely ranks within the same class as the more far-reaching forms of cooperation. Possibly raising a person's sentence is not as *non-committal* as taking a witness statement upon the request of another member state. It requires a level of understanding and acceptance of another member state's criminal justice system that is comparable with the execution of the foreign conviction. Therefore accepting double criminality filtering in the context of cross-border recidivism is not at all inconsistent with the acceptance of double criminality filtering in international cooperation in criminal matters.

Interestingly more recently member states have limited their possibility to invoke double criminality as a refusal ground, first in the EAW (Keijzer 2008; van Sliedregt 2009) and later copied into other mutual recognition instruments currently governing a large part of international cooperation in criminal matters. A list of 32 offences has been introduced for which double criminality can no longer be used as a refusal ground if the offence is punishable with a deprivation of liberty of at least 3 years in the issuing member state. Member states have agreed to recognise and execute foreign financial penalties, confiscations, alternative measures and even measures involving deprivation of liberty in spite of lacking double criminality. This evolution raises questions with respect to the appropriateness of the introduction of a similar list in other EU instruments even beyond international cooperation in criminal matters e.g. in the context of taking account of foreign convictions in the course of a new criminal proceedings. The question arises whether consistent European policy making would not require a provision stipulating that foreign convictions in relation to any of the 32 listed offences are to receive effect in any of the other member states regardless of double criminality issues. However, the introduction of the list of 32 offences and the subsequent abandonment of double criminality filtering in relation thereto is still subject to a lot of criticism in the context of international cooperation in criminal matters (De Bondt 2012). Though several instruments

make use of the list, the policy line is still in full development. The introduction of the possibility to issue a declaration stating not to agree with the unacceptability of double criminality filtering in the most recent mutual recognition instruments comes to testify that.

In addition to the fact that consistency arguments are not strong enough to render double criminality filtering unacceptable in the context of cross-border recidivism, the introduction of a list of 32 offences in its current form would not necessarily change anything in the member states' practice. Should the introduction of a list of 32 offences be considered, this would likely be complemented with the possibility to issue a declaration not to agree with it as is done in the most recent mutual recognition instruments. In effect, a such provision would be equal to the current Recital 6 FD Prior Convictions which stipulates that the framework decision does not entail *an obligation* to attach legal consequences to a foreign conviction if the underlying behaviour would not have been an offence in the prosecuting member state and therefore *"a national conviction would not have been possible regarding the fact"*. Member states that wish to refrain from double criminality filtering (in line with the limitation of the acceptability thereof in international cooperation in criminal matters embodied by the list of 32 offences) can do so, member states that wish to retain the possibility to use the double criminality filter (in line with the possibility to declare not to accept the abandonment thereof in international cooperation in criminal matters) can also do so. Hence, introducing a list of 32 offences for which double criminality filter is not accepted for questionable consistency reasons, would not change the practice of cross-border recidivism.

3 Enforcing approximation commitments

Having set the base of the policy triangle and having decided that there are no theoretical nor consistency argumentations to in principle be opposed to double criminality filtering in cross-border recidivism cases, that first side of the policy triangle needs to be linked to the EU's approximation policy which constitutes the second side of the policy triangle. Analysis will reveal whether or not the policy decision to approximate certain (parts of) offences should have a consequence for the acceptability of double criminality filtering in cross-border recidivism cases.

The EU's approximation policy gained its current shape with the entry into force of the Amsterdam Treaty. Art 29 and 31 (e) TEU introduced the possibility to approximate the constituent elements of offences, in the fields of organised crime, terrorism and illicit drug trafficking, which entails that member states are to ensure that the behaviour included in the approximation instrument

constitutes a criminal offence in their jurisdiction. Art. 34 TEU introduced the framework decision, a new instrument specifically designed to that end. Approximating framework decisions have been adopted with respect to euro counterfeiting, fraud and counterfeiting of non-cash means of payment, money laundering, terrorism, trafficking in human beings, illegal (im)migration, environmental offences, corruption, sexual exploitation of children and child pornography, drug trafficking, offences against information systems, participation in a criminal organisation and finally racism and xenophobia. One of the fundamental critiques with respect to approximation as a legal tool is the lack of enforcement mechanisms (Borgers 2007; Hinarejos 2008). The Union remained powerless in the event implementation was late, incorrect and/or incomplete. This lacunae in the European legal framework was filled with the entry into force of the Lisbon Treaty which now includes the approximation provisions in Art. 83 TFEU, introduces the directive as the applicable legal instrument, changes the unanimity requirement into a qualified majority voting and also foresees the possibility for the European Commission to start an infringement procedure to deal with implementation problems. Through the infringement procedure the Union can enforce the approximation commitments.

However, the approximation commitments can also be enforced through explicitly prohibiting the use of double criminality filters in relation to offences that have been subject to approximation. It would be inappropriate to allow member states to use their lagging behind with respect to their approximation commitments as an excuse to be allowed to use the double criminality filter. Therefore, the European Union in its capacity of a policy maker enforcing the approximation acquis failed to appreciate the possibilities to enforce the approximation commitments beyond the either or not existence of an infringement procedure, through limiting the acceptance of double criminality filtering.

4 Availability of criminal records information

Furthermore, the commitment to honour cross-border recidivism requires adequate information on both national and particularly foreign prior convictions. Not wasting too many words on the matter, Art 3.1 FD Prior convictions suffices by referring to the criminal records information obtained under applicable instruments on *mutual legal assistance* or on *the exchange of information extracted from criminal records*. In doing so, that provision establishes the link between the prior conviction policy and the policy that ensures the availability of criminal records information. Therefore, the third side of the policy triangle is made up of that policy domain.

A person's criminal record is compiled in the member state of the person's nationality. In theory, information on all the prior convictions is stored, regardless of the nationality of the convicting authority. A single question directed to the criminal records authority of the member state of the person's nationality should suffice to obtain a complete overview of existing prior convictions. However, theory and practice do not always correspond. The inclusion of information on foreign conviction is far from self-evident and is strongly dependent not only on the *exchange* of information when a member state hands down a conviction against a national of another member state, but also on the will of the receiving member state to *store* foreign conviction information of its nationals. Because the implementation deadlines of the new EU level instruments have not passed yet, the current legal framework is still largely based on the 1959 European Convention on Mutual Assistance (abbreviated to ECMA)[361], which has two important weaknesses that are baleful for the inclusion of information on foreign convictions and therefore the availability thereof for later use in cross-border recidivism cases.

First, even though Art. 22 ECMA stipulates that states shall inform one and other of all criminal convictions and subsequent measures in respect of nationals of another state party at least once a year and in spite of the full ratification thereof, the exchange of criminal records information is considered problematic. The ECMA provisions are deemed to be inadequate[362] and states simply do not seem to go through the trouble of complying with this commitment (Xanthaki 2008). Because the flow of information on foreign convictions to the member state of the person's nationality was not guaranteed, judges could not rely on the content of the criminal record kept in the member state of a person's nationality and had to send a request to each of the other 26 member states.

Second, with a view to ensuring that foreign convictions are taken into account in the course of new criminal proceedings, the other concern relates to the absence of an obligation *to store* foreign conviction information on own nationals. It comes as no surprise that when there is no obligation to store information there is no guarantee that national criminal records databases will include foreign criminal record data on their nationals. Only few countries stored information without further restrictions, many member states filtered along a double criminality criterion and only included those convictions of their nationals for which the underlying behaviour would also have constituted an offence if committed in their jurisdiction and some member states stored no information at all. Reportedly, in the past Hungary did not store foreign criminal record information on its nationals (Ligeti 2008), neither did the UK (Webly

[361] European Convention on mutual assistance in criminal matters ETS n°30 of 20.4.1959.

[362] Recital 8 Council Framework Decision 2009/315/JHA on the organisation and content of the exchange of information from the criminal record between Member States. OJ L 93 of 7.4.2009.

2008). Therefore, even if member states notify their counterparts in the member state the person's nationality, the completeness of the information in the person's criminal record is undermined by the lack of storage guarantees. As a result of these two weaknesses, the information with respect to foreign convictions actually included in a person's criminal record – at the time of the adoption of FD Prior Convictions – is partial and unreliable and therefore insufficient to support the commitment to take account of foreign convictions in the course of a new criminal proceeding. To obtain a full overview of a person's prior criminal history, a request needs to be directed to the criminal records authorities of each of the 26 other member states in order to learn whether a conviction has been handed down against that person in that particular member state. This is far from the ideal starting point to guarantee an effective cross-border recidivism practice.

5 Future criminal records prospects

5.1 Tackling the weaknesses

Within the European Union, the member states decided to take matters to the next level and tackle the two main weaknesses. Though the sequence in the adoption of the instruments cannot be free from critique[363], consensus was reached with respect to two simultaneous instruments to step up the criminal records exchange mechanism amongst the member states in the year following the adoption of FD Prior Convictions. A framework decision (abbreviated to FD Crim Records) has been adopted on the organisation and content of the exchange of criminal records, and has been complemented by a decision designing the European Criminal Records Information System (abbreviated to ECRIS Decision).[364]

Through the introduction of quasi real-time information exchange and a general storing obligation the main weaknesses with respect to the Council of

[363] Recital 4 FD Crim Records and Recital 3 ECRIS Decision clarify that the need to improve the exchange of criminal records information was prioritized in the 2004 European Council Declaration on Combating Terrorism and was subsequently reiterated in the 2004 Hague Programme and its complementing 2005 Action Plan. Nevertheless it was not until after the adoption of the FD Prior Convictions political consensus was reached.

[364] Respectively Framework Decision 2009/315/JHA on the organisation and content of the exchange of information from the criminal record between Member States. OJ L 93 of 7.4.2009 and Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ L 93 of 7.4.2009.

Europe ECMA are tackled for the future. Regrettably no retroactive completion of the existing criminal records is foreseen, so that in practice a fully functioning cross-border recidivism concept will only apply to convictions handed down at the latest from 7 April 2012 onwards, the deadline for implementation.

5.2 Fine-tuning the exchange template

5.2.1 Deducing requirements

However, the criminal records policy would not serve its purpose if it would limit its objectives to only ensuring the exchange and storing of criminal records information. Such objectives do not necessarily guarantee the level of detail needed with respect to foreign prior conviction information. Information is not merely exchanged to be stored, or stored to be exchanged. That is the *minimum minimorum* that can be expected from a European policy. The information flow essentially aims at ensuring that the information can actually be used at a later stage. Therefore, to be able to develop a well considered policy with respect to the exchange of criminal records information, finds the right balance with the two other sides of the policy triangle. A well balanced policy takes account of the requirements originating from both the prior conviction policy as well as the approximation policy.

A threefold requirement can be deduced from the analysis above.

First, because double criminality filtering is inacceptable with respect to behaviour that have been subject to approximation, convictions that relate to such behaviour must be easily distinguishable, to be able to exclude them from any filtering process. On the one hand, member states that have correctly implemented the approximation instruments, will not have a problem with the fact that the said conviction will not be put through to the double criminality filter. On the other hand, member states that have not correctly implemented the approximation instruments should not be allowed to use their lagging behind as a reason to be allowed to filter out the conviction.

Second, to facilitate double criminality filtering, it would be useful to compile the existing knowledge on behaviour that is known to pass through any of the double criminality filters in all member states, even beyond what has been subject to approximation.

Third, when convictions relate to behaviour that has not been subject to approximation nor is known to be criminalised throughout the EU for another reason, it must be considered to require the mandatory inclusion of a short

description of the behaviour to complement exchange and storing of information.

5.2.2 Evaluating ECRIS

Upon the passing of the implementation deadline on 7 April 2012, criminal records information exchange in the EU will be governed by FD Crim Records and the complementing ECRIS Decision. ECRIS – short for the European criminal records information system – introduces templates to facilitate the exchange of criminal records information which is an important novelty when compared to the existing exchange mechanisms. To overcome the difficulties experienced with the *interpretation* and so-called *nationalisation* of foreign convictions, the choice was made to introduce a reference index which would be the backbone of criminal records exchange and against which all member states could map their criminalisation provisions. Recital 12 ECRIS Decision highlights its ambition to have classified all possible offences/behaviour for which one can be convicted and has introduced a reference code for each of those offence(s) (categories).

To implement the European criminal records information system, each member state has to develop a conversion table linking each and every one of the provisions of its criminal code to the ECRIS coding system. As a result, in a fictitious example, a member state will know that the behaviour criminalised under Art. X of its national criminal code corresponds to the behaviour that is included in code 111 of the ECRIS template. Similarly, the behaviour criminalised under Art. Y of its national criminal code corresponds to the behaviour that is included in code 222 of the ECRIS template. As soon as each of the 27 member states has developed a conversion table, ECRIS will become a sort of Esperanto that can be used as a language that is understood by each of the member states.

Subsequently, Art. 4 ECRIS Decision requires that criminal records information exchange is based on those codes. When sending information on a conviction for which the underlying behaviour is criminalised in Art. X of the national criminal code, the sending criminal records authority will indicate that the conviction relates to the ECRIS code 111. At the receiving end, the receiving authority will know to which provision in his national criminal code a conviction corresponding to ECRIS 111 will relate.

However, in spite of the good intentions, analysis leads to the conclusion that this technique does not suffice when reviewed in light of the double criminality filters found in recidivism provisions nor the requirements deduced from the approximation acquis.

Considering the existence of double criminality filters, be it explicit such as the one found in Art. 75 (3) of the Portuguese criminal code, or implicit when defining the meaning of similarity between the offences, the ECRIS classification system – and therefore also its coding system is – not detailed enough. The following example clarifies this concern. In the event a person is convicted for an offence related to child pornography, ECRIS code 1009 00 which comprises *offences related to child pornography* will be used when exchanging criminal records information. However, though it may seem that a reference to that code gives very specific information on the behaviour underlying the conviction, it should be noted that all member states have a different conception of the offences they relate to child pornography (Gillespie 2010). Therefore, in spite of that code, the underlying behaviour is still not clear enough to apply the double criminality filter found in cross-border recidivism provisions. It can hardly be disputed that the diversity in the member states' incriminations is common knowledge, because it has been explicitly recognised by the then framework decision (abbreviated to FD Child Pornography) and has been reinforced by the new directive (abbreviated to Dir Child Pornography)[365], when defining child pornography. Art. 3.2 FD Child Pornography lists the behaviour member states may *exclude* from the scope of the incrimination, affirming that at least for that behaviour, the criminal codes will differ. Similarly, Art 5.7 and Art 5.8 Dir Child Pornography stipulate that member states retain the discretion to decide whether the included behaviour is considered to be criminal or not. Therefore a reference to ECRIS code 1009 00 will not be (nor become) sufficient to establish whether or not the double criminality requirement has been fulfilled. This lack of detail is highly problematic in light of existing double criminality filters. When receiving foreign conviction information to store in a person's criminal record or to take it into account in the course of a new criminal proceeding, the reference to code 1009 00 will not have any added value whatsoever when deciding whether the conviction may be passed through a double criminality filter nor when evaluating whether double criminality is met or not.

[365] Respectively, Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 of 20.1.2004 and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335 of 17.12.2011.

6 Conclusion: Between fact and fiction

A strictly national interpretation of prior conviction provisions is outdated in an evolving European Union in which the effect of borders in fading away and a single area of freedom, security and justice is being installed. Representing those prior conviction provisions, cross-border recidivism as a concept influencing the sentence imposed at the end of a new criminal proceeding was singled out as a case study. Either or not limiting the application of cross-border recidivism along the double criminality requirements is an individual member state decision. There are no theoretical or consistency inspired contraindications against the use of double criminality filtering as such. From that perspective, the policy line found in FD Prior Convictions in which it is anchored that – in spite of the fading borders and growing recognition of *foreign* convictions – there cannot be an obligation to take account of a foreign conviction if the underlying behaviour would not have constituted an offences in the proceeding member state, needs to be supported. However, two fundamental critiques have surfaced in relation to that policy line, when reviewing it in light of the policy triangle required to support the viability of cross-border recidivism.

First, the policy line regulating the taking account of prior convictions is completely detached from the policy line aiming to approximate offences, though these two policy lines should meet when introducing a double criminality filter. Though nothing prevents the introduction of double criminality filtering as a general limit to taking account of prior convictions, this filtering process should not be unlimited. To the extent member states have agreed to approximate and thus ensure criminalisation of certain behaviour they have also – though implicitly – agreed that the use of a double criminality filter in relation to that behaviour is no longer acceptable. Therefore, in light of the critiques raised with respect to the lack of enforcement mechanisms in case of incorrect implementation of the approximation instruments, it is a missed opportunity to explicitly introduce a limit to the use of double criminality filtering as an indirect enforcement tool. This first critique can easily be tackled. Because relying on exemplary implementation of the approximation instruments is naive, it must be recommended to amend the current double criminality provision (i.e. Recital 6 FD Prior Conviction) and complement it with a clause in which it is stipulated that under no condition double criminality filtering is acceptable in relation to offences that have been subject to approximation.

Second, the information exchange policy is not tailored to fit the needs of cross-border recidivism. Besides the obvious critique with respect to the sequence in which the instruments have been adopted as a result of which the mandatory taking account of prior convictions required sending out simultaneous information requests to all 26 other member states as opposed to a

single question to the member state of nationality, the new architecture of criminal records information exchange will not provide the practitioners with the level of detail in the prior conviction information they need for the application of their prior conviction provisions. The level of detail in the coding system introduced with ECRIS is far from adequate.

However, though ECRIS has its obvious weaknesses, with the implementation deadline in sight it would be inappropriate to throw away the baby with the bathwater. Such a radical intervention is not even necessary. The coding system can easily be redesigned in a way that strikes the right balance between ensuring swift information exchange, safeguarding the approximation acquis and supporting the prior conviction policy. It can easily be redesigned in a way that restores the links with the two other domains that are part of the policy triangle. Two design criteria need to be taken into account: firstly it must allow immediate identification of cases that relate to behaviour that has been subject to approximation and can therefore under no circumstances be filtered out and cases for which double criminality is uncertain. Secondly, to facilitate the taking into account of a foreign conviction in the course of a new criminal proceeding and thus to apply cross-border recidivism, it should be recommended to even differentiate as much as possible and preserve as much detail as possible on the foreign conviction by introducing a level of detail that matches the detail included in approximation instruments.

Retaking the example of a prior conviction for child pornography, the first criterion calls for a distinction between types of child pornography for which criminalisation is made *mandatory* in the FD or Dir Child Pornography (e.g. using the code 1009 01 and in doing so introducing suffix 01) and types of child pornography for which criminalisation is *uncertain* due to the exclusion possibilities listed in Art. 3.2 FD Child Pornography (e.g. using the code 1009 02 and in doing so introducing suffix 02). Following that distinction a conviction with a reference to ECRIS code 1009 01 in the context of criminal records exchange will immediately be recognised as a foreign conviction that has been subject to approximation and therefore should be taken into account as possible cross-border recidivism. The second criterion, to facilitate the application of the cross-border recidivism provisions, calls for a level of detail in the information exchange templates that mirrors the level of detail included in the approximation instruments to preserve as much detail as possible on the prior convictions. The approximation instruments distinguish between the (a) production, (b) distribution, dissemination or transmission, (c) supplying or making available and (d) acquisition or possession of child pornography. Each of those subcategories should receive an individual code that can be used for information exchange and in doing so provide the sentencing judge detailed information on the foreign conviction that could facilitate the decision on the

impact of the prior conviction on the new sentence. Building a template that includes that level of detail is exactly what has been done when developing EULOCS, short of EU level offence classification system (Vermeulen and De Bondt 2009). Additionally, to the extent that the behaviour underlying the conviction does not match any of the approximated offence categories, a code 1009 02 used to characterise the conviction should be complemented with a short summary of the facts to avoid that follow-up questions to obtain additional information on the facts are no standard necessity.

Due to the flaws in the policy triangle that is supposed to support it, cross-border recidivism is floating between fact and fiction. In theory, based on the obligation included in FD Prior conviction, it is a fact, in most member states limited along a double criminality requirement. It is regrettable that the criminalisation commitments included in approximation instruments are not enforced via a mandatory taking account of related convictions in the course of a new criminal proceeding. As a result, cross-border recidivism for approximated offences is possibly a fiction. Most disturbing are the innovations with respect to criminal records exchange. The gaps formed in the pre-ECRIS era are not filled and the information exchanged based on the new ECRIS templates lack the required level of detail. As a result, taking account of foreign convictions places a high burden on sentencing judges who have to put in a lot of effort into obtaining the information needed to apply their national prior conviction provisions. Therefore, it can only be hoped for that the ECRIS templates are revisited using the possibility thereto foreseen in Art. 6.1 ECRIS Decision and at least make a distinction between a conviction for behaviour which is known to be criminalised in all member states and a conviction for behaviour for which no legal basis exists that guarantees double criminality. Only in doing so, the right balance can be struck between the three domains that form the policy triangle supporting the viability of cross-border recidivism.

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Rethinking public procurement exclusions in the EU

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Published in G. Vermeulen, W. De Bondt, C. Ryckman, & N. Persak, The disqualification triad. Approximating legislation. Executing requests. Ensuring equivalence. Antwerp-Apeldoorn-Portland: Maklu

Rethinking public procurement exclusions in the EU

1 Introduction

The case study* on public procurement seeks to test the applicability of the recommendations developed to increase the effect of disqualifications in the EU. Public procurement refers to the government's activity of setting up public procedures for the purchasing of the services, goods and/or work which it needs to carry out its functions.[366] When a government seeks to renovate a building with a view to house an administrative department, the purchasing of *services* will refer to the architectural advice preceding the renovation, the purchasing of *goods* will refer to the building materials necessary for the renovation and the purchasing of *work* to the actual man-hours to complete the renovation. The public procedure aims at ensuring that the best available product is purchased at the best available price.

The reason why public procurement is singled out as a case study in this analysis of the future of disqualifications as sanction measures in the EU can be found in the mandatory exclusion grounds that are inserted in the revised legal framework. Member states are to legislate that candidates convicted for any of the listed offences are disqualified from participating in public procurement procedures. Those disqualifying exclusion grounds are subject to analysis in this case study.

The current EU legal framework governing public procurement procedures has a long history. Already in the 70s the then EC decided to approximate the national provisions governing public procurement procedures. Approximation was considered necessary for an effective public procurement policy which is considered fundamental for the common market to be successful in achieving its objectives.[367] Art. 2 TEC states that the Community has as its task *the establishment of a common market,* a goal to be reached – as explained in Art. 3 TEC – *by the abolition of obstacles to the free movement of goods, persons, services and capital.* The main concern has always been to eliminate any possible form of unequal treatment and discrimination amongst others in the field of public

* This first case study was developed by Wendy De Bondt in the context of her doctoral research.

366 S. ARROWSMITH (1998), National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?, in S. ARROWSMITH and A. DAVIES (eds.), *Public Procurement: Global Revolution*, London: Kluwer Law International.

367 COM(85) 310, White Paper from the Commission to the European Council, Milan, 28-29.6.1985, § 81, http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf; Green Paper on Public Procurement in the European Union: Exploring the way forward, Communication adopted by the Commission on 27 November 1996.

procurement. All policy documents called for the elimination of restrictions with respect to foreigners only, which exclude, limit or impose conditions upon the capacity to submit offers or to participate in public tender procedures.[368] To that end, a series of directives was adopted.

The first coordinating directives adopted are related to public *works* contracts[369] and public *supply* contracts[370]. It must be said that – in spite of the large political consensus on their importance – the implementation of this first set of directives was far from successful.[371] Looking to boost the debate on the regulation of public procurement in the EU, the 1985 White Paper on the Completion of the Internal Market contained a chapter on Public Procurement and served as a catalyst for the amendments made in the following years.[372] It was not until 1992 a directive was adopted with regard to the public *service* contracts.[373] The establishment of the procurement trilogy[374] did not mean the end of the debate on this topic. In 1996 a Green Paper[375] was issued followed in 1998 by a Commission Communication[376] recognising the need to further

[368] D. MEDHURST, (1997) *EC Public Procurement Law*, Sussex: Blackwell Science, 24, P. TREPTE, (2007) *Public Procurement in the EU. A Practitioner's Guide*, Oxford: University Press, 28.

[369] Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, *OJ* L 185 of 16.8.1971 [hereafter: Works Directive].

[370] Council Directive 77/62/EEC of 21 December 1976 concerning the coordination of procedures for the award of public service contracts, OJ L 13 of 15.1.1977 [hereafter: Supply Directive].

[371] COM(85) 310 final, White Paper from the Commission to the European Council, Milan, 28-29.6.1985, § 83 http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf. J.M. FERNANDES MARTIN (1996), *The EC Public Procurement Rules*, Oxford: Clarendon Press, 93-146.

[372] COM(85) 310 final, White Paper from the Commission to the European Council, Milan, 28-29.6.1985, http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf.
§ 84 reads: The Commission will open discussions with the Member States and through them with the awarding entities on the application of the Directives.
§ 85 reads: In order to stimulate a wider opening up of tendering for public contracts, there is a serious and urgent need for improvement of the Directives to increase transparency further. Priority should be given to a system of prior information; to publication of the intention to use single tender procedures; to publication of the awards of contracts; and to improve the quality and frequency of statistics. [...] Besides, more visible action by the Commission in policing compliance with existing law will increase the credibility of the Community's efforts to break down the psychological barriers to crossing frontiers.

[373] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, OJ L 209 of 24.7.1992. [hereafter: Service Directive].

[374] The procurement trilogy consisted of the Works Directive as amended by Council Directive 89/440/EEC of 18 July 1989, the Supply Directive as amended by Council Directive 88/295/EEC of 22 March 1988 and the Service Directive.

[375] Green Paper on Public Procurement in the European Union: Exploring the way forward, Communication adopted by the Commission on 27 November 1996.

[376] COM(l998) 143 final, Commission Communication on Public Procurement in the European Union, Brussels, 11.03. 1998.

consolidate and integrate, modernise and simplify the legal framework. It took until 2004 to adopt a consolidating directive which coordinates the three procurement domains, comprises the revised legal framework for public procurement in the member states and introduces – as one of the novelties – mandatory exclusion grounds for candidates convicted for any of the listed offences.[377] From the preamble it becomes clear that the main objective remains the creation of the conditions of competition necessary for the non-discriminatory award of public contracts, the rational allocation of public money through the choice of the best offer presented, suppliers' access to a truly single market with significant business opportunities and the reinforcement of competition among European enterprises. This is important to keep in mind, for it will be argued that an incorrect interpretation and application of the exclusion grounds might jeopardise that objective.

In January 2011, the European Commission launched a new Green Paper on the modernisation of the EU's public procurement policy, in which it is stipulated that exclusion of bidders is a powerful weapon to punish – and also to a certain extent prevent – unsound business behaviours. However, a number of questions relating to the scope, interpretation, transposition and practical application of this provision remain open, and member states and contracting authorities have called for further clarification. *It should be examined in particular whether the exclusion grounds in Article 45 are appropriate, sufficiently clear (notably the exclusion ground of "professional misconduct") and exhaustive enough, or if further exclusion grounds should be introduced. Contracting authorities also seem to be faced with practical difficulties when trying to obtain all relevant information on the personal situation of tenderers and candidates established in other member states and their eligibility according to their national law. Furthermore, the scope for implementing national legislation on exclusion grounds will probably need to be clarified. Providing for member states to introduce additional exclusion grounds in their national legislation might enable them to tackle specific problems of unsound business behaviours linked to the national context more effectively. On the other hand, specific national exclusion grounds always entail a risk of discrimination against foreign bidders and could jeopardise the principle of a European level playing field.*[378] Considering that those concerns receive little attention in the results of that latest consultation[379], the

[377] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts." *OJ L 143 of 30.4.2004* [hereafter: Procurement Directive].

[378] COM(2011) 15 final, Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market, Communication adopted by the European Commission on 27 January 2011.

[379] The synthesis of the replies only rephrases the concern raised in the Green Paper itself, providing that *there is consensus amongst all stakeholder groups that Article 45 of Directive 2004/18/EC is a useful instrument to sanction unsound business behaviours. Nevertheless, certain*

exclusion grounds introduced in the 2004 Procurement Directive will be critically assessed against the background of the recommended disqualification triad to increase the effect of disqualifications in the EU, which consists of:

- Approximating exclusion grounds for approximated offences;
- Attaching equivalent effect to foreign convictions; and
- Executing a mutual recognition request.

2 Approximated exclusion grounds for approximated offences

The first policy recommendation within the disqualification triad consists of introducing approximated disqualifications as sanction measures for a set of approximated offences. Applied in the context of public procurement, the disqualification as a sanction measure relates to the exclusion from participating in a procurement procedure. Once convicted for identified approximated offences, a person is no longer eligible as a candidate in a public procurement procedure and will be excluded from participation. In the current EU legal instruments, an exclusion can be found for having been convicted for participation in a criminal organisation, fraud, corruption and money laundering. In doing so, disqualification upon being convicted for certain approximated offences is guaranteed throughout the EU, regardless of attaching an equivalent effect to a foreign conviction or cross-border execution of foreign convictions, which are the second and third policy recommendation that will be elaborated on below.

The analysis of the way this policy recommendation is currently developed in the EU's legislative instruments revealed three issues that need further elaboration. The first issue relates to the legal instruments used to approximate. Whereas traditionally approximation is found in (former third-pillar) framework decisions or post-Lisbon directives[380], analysis reveals that approximation with

clarifications are considered useful by many respondents, notably with regard to generic notions such as "professional misconduct", as well as rules on a maximum duration of the debarment, Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market, Synthesis of replies, available at http://ec.europa.eu/internal_market/consultations/docs/2011/public_procurement/synthesis_document_en.pdf.

[380] For reasons of completeness, it must be added that approximation extends beyond what is regulated in framework decisions (complemented with the post-Lisbon directives) and the complementing first-pillar instruments. See more elaborately: W. DE BONDT and G. VERMEULEN (2010). Appreciating Approximation. Using common offence concepts to facilitate police and

respect to procurement procedures is found in (former first-pillar) directives. The second issue relates to the approach used to delineate the scope of the disqualification *ratione materiae*, i.e. the delineation of the offences that give rise to a disqualification from participation in a procurement procedure. The third issue relates to the necessary flanking measures with respect to the availability of information to live up to the commitments with respect to the approximated disqualifications.

2.1 Framework Decisions & Directives

The first issue relates to the instruments used to approximate. When reviewing approximation in criminal matters, focus is directed towards framework decisions. In parallel to the introduction of the possibility to approximate the constituent elements of offences and sanctions in the Amsterdam Treaty, the framework decision was introduced as the new instrument specifically designed to develop an approximation acquis. Art. 31.1 (e) TEU stipulated that *common action on judicial cooperation in criminal matters shall include progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking* and was complemented by Art. 34.2 (b) TEU which stipulated that the Council may *adopt framework decisions for the purpose of approximation of the laws and regulations of the member states. Framework decisions shall be binding upon the member states as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect*. In the mean time, post-Lisbon directives have to be added to the list of instruments in which approximation provisions can be found. The coming into force of the Lisbon treaty – which lead to the disappearance of the three pillar structure and a corresponding restructuring of the legal instruments[381] – has designated the directive as the instrument to be used for approximation in the future. Therefore, as suggested by the subtitle of this section, an analysis of the approximation acquis requires looking into the content of both framework decisions as well as directives. Approximation instruments have been adopted for euro counterfeiting[382], fraud and counterfeiting of non-cash means of

judicial cooperation in the EU. In M. COOLS (Ed.), Readings On Criminal Justice, Criminal Law & Policing (Vol. 4, pp. 15-40). Antwerp-Apeldoorn-Portland: Maklu.

[381] See more elaborately on the changes brought about by the Lisbon treaty: S. Peers (2008). EU Criminal Law and the Treaty of Lisbon. *European Law Review*, 33(4), 507; W. DE BONDT and A. DE MOOR, De Europese Metamorfose? De implicaties van het Verdrag van Lissabon voor het Europees Strafrecht. *Panopticon*, 1, 31; C. JANSSENS (2009). Europees strafrecht en het Verdrag van Lissabon. Een verhaal van déjà vu's, dwarsliggers en compromissen. *Nullum Crimen*, 1, 14.

[382] Council Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L

payment[383], money laundering[384], terrorism[385], trafficking in human beings[386], illegal (im)migration[387], environmental offences[388], corruption[389], sexual exploitation of a child and child pornography[390], drug trafficking[391], offences against information systems[392], participation in a criminal organisation[393] and racism and xenophobia[394].

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140 of 14.06.2000 *as amended by* the Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro, OJ L 329 of 14.12.2001.

[383] Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment, OJ L 149 of 2.6.2001.

[384] Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182 of 5.7.2001 [hereafter: FD Money Laundering].

[385] Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164 of 22.6.2002 *as amended by* Council Framework Decision amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330 of 9.12.2008.

[386] Council Framework Decision of 19 July 2002 on combating trafficking in human beings, OJ L 20 of 1.8.2002 *repealed and replaced* by Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, OJ L 101 of 15.4.2011.

[387] Council Framework Decision of 28 November 2002 on the strengthening of the legal framework to prevent the facilitation of unauthorised entry, transit and residence, *as complemented by* the Council Directive of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 128 of 5.12.2002.

[388] Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law, OJ L 29 of 5.2.2003 and Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255 of 30.9.2005 *annulled and replaced by* Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328 of 6.12.2008.

[389] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192 of 31.7.2003.

[390] Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 of 20.1.2004 *repealed and replaced by* Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L 335 of 17.12.2011.

[391] Council Framework Decision of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, OJ L 335 of 11.11.2004.

[392] Council Framework Decision of 21 February 2005 on attacks against information systems, OJ L 69 of 16.3.2005.

[393] Council Framework Decision of 24 October 2008 on the fight against organised crime, OJ L 300 of 11.11.2008 [hereafter: FD Organised Crime].

[394] Council Framework Decision of 29 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328 of 6.12.2008.

Within those framework decisions and directives, provisions can be found instructing member states to legislate in a way that allows certain sanctions to be imposed on natural persons as well as on legal persons. With respect to natural persons, the approximated sanctions are mainly sanctions involving deprivation of liberty. Art. 4.2 FD Corruption stipulates that [e]ach member state shall take the necessary measures to ensure that the conduct referred to in Article 2 is punishable by a penalty of a maximum of at least one to three years of imprisonment. With respect to legal persons, the approximated sanctions are mainly mandatory financial sanctions and a set of optional alternative sanctions. Art. 6 FD Corruption stipulates that [e]ach member state shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as exclusion from entitlement to public benefits or aid [...]. Unfortunately, the exclusion from participation in a public procurement procedure is not listed as a possible sanction. Nevertheless, this would be the place where approximation of sanctions would be expected.

However, this does not mean that exclusion from participation in a public procurement procedure has not been subject to approximation. Whereas traditionally review of approximation in criminal matters is limited to the above mentioned framework decisions and post-Lisbon directives, approximation is also pursued via former first pillar directives. As clarified when elaborating on the built-up to the current EU framework governing public procurement, the approximation of mandatory exclusion from being able to participate in a public procurement procedure is precisely one of the novelties of the consolidating 2004 Procurement Directive.

Besides consolidating the then existing legal framework, a number of novelties were introduced[395], one of them being the mandatory character of certain conviction related exclusion grounds. In the old directives, contracting authorities were allowed to exclude candidates for having been convicted for an offence concerning their professional conduct.[396] In addition to this optional conviction related exclusion ground,[397] Art. 45(1) introduces a mandatory exclusion ground applicable to any contractor who has been subject of a conviction by final judgement for one or more of the listed offences, in as far as

[395] For a complete overview, see e.g. S. ARROWSMITH (2004). As assessment of the new legislative package on public procurement. *Common Market Law Review*, 41, p 1277-1325;

[396] Art. 29(c) Dir 92/50/EEC, Art. 20(c) Dir 93/36/EEC and Art. 24(c) Dir 93/37/EEC can be criticised for not clarifying which specific behaviour they relate to. See e.g. E. PISELLI, (2000) The scope for excluding providers who have committed criminal offences under the E.U. Procurement Directives. *Public Procurement Law Review*, 6, p 267-286.

[397] Now included in Art 45(2)(c) Procurement Directive.

the contracting authority is aware of it. In doing so an approximated disqualification is introduced for a selection of offences. These four offences are participation in a criminal organisation, corruption, fraud against the financial interests of the European Communities and money laundering. They were singled out because public procurement is said to be particularly vulnerable to those offences.[398]

It must be said, that in light of the discussions on the division of competences between the former first and third pillar, it is surprising to find approximating provisions with respect to sanctions in a first pillar instrument. The position of the Court of Justice has always been that – in the event the competence with respect to a policy domain in shared between the first and third pillar (e.g. when third pillar criminal law are wanted to strengthen the legal framework with respect to a first pillar domain) – approximation of the offence can be done in a first pillar instrument whereas approximation of the sanction should always be done in a third pillar instrument.[399] Though there are old examples in which the split has not caused any problems[400], there has been considerable debate[401] with respect to the legal basis for an instrument on the protection of the environment

[398] Communication from the Commission to the Council and the European Parliament on a Union Policy Against Corruption. COM (1997) 192 final of 21.05.1997 and Communication from the Commission on Public Procurement in the European Union. COM(1998) 143 final, of 11.03.1998 See also: S. WILLIAMS (2009) Coordinating public procurement to support EU objectives - a first step? The case of exclusions for serious offences", in ARROWSMITH, S. and KUNZLIK, P., Social and Environmental Policies in EC Procurement Law, Cambridge: Cambridge University Press, p 479-498, P.-A TREPTE (2007). Public Procurement in the EU. Oxford: Oxford University Press, p 338; E. MANUNZA (2002) EG-aanbestedingsrechtelijke problemen bij privatisering en bij de bestrijding van corruptie en georganiseerde criminaliteit. Een beschouwing over de vraag of privatiseringsoperaties en de bestrijding van corruptie en georganiseerde criminaliteit een belemmering vormen voor de voltooiing van de Europese markt voor overheidsopdrachten Deventer: Kluwer, p245.

[399] ECJ, Case C-176/03, Commission v Council, 13 September 2005; ECJ, Case C-440/05, Commission v Council, 23 October 2007.

[400] Reference can be made to the 2002 framework decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328 of 5.12.2002) as complemented with the 2002 directive defining the facilitation of unauthorised entry, transit and residence (OJ L 328 of 5.12.2002).

[401] See e.g. DAWES, A., & LYNSKEY, O. (2008). The Ever-longer Arm of EC law: The Extension of Community Competence into the Field of Criminal Law. *Common Market Law Review*, 45, 131; CENTER, E. L. S. (2007). Approximation of European Environmental Criminal Laws: Within of beyond the European Community Competence? *Columbia Journal of European Law*, 13, 747; WENNERÅS, P. (2008). Towards an ever greener Union? Competence in the field of the environment and beyond. *Common Market Law Review*, 45, 1645.

through criminal law.[402] The inclusion of a disqualification measure in the 2004 Procurement Directive is contrary to that policy line.

In any event, the current approximation acquis governing the disqualification from participation in a public procurement procedure requires a combination not only of the approximating framework decisions and the new approximating directives, but additionally needs to be combined with the approximating provisions that can be found in other EU instruments. Based on the analysis above, two types of directives exist. For the purpose of this case study, the directives in which the constituent elements of offences, will be referred to as the approximating directives; the directive in which the procurement procedures are 'approximated' will be referred to as the Procurement Directive, to clearly distinguish between the two types of directives currently included in the relevant EU instrumentarium.

It remains regrettable though, that the approximation of sanctions is not bundled into one instrument, but requires the combination of multiple instruments. There have been a number of missed opportunities to better coordinate the coexistence of the various instruments. Considering that the 2004 Procurement Directive for example introduced the obligation to exclude candidates for having been convicted for participation in a criminal organisation, it is unfortunate that no references to that obligation is included when reviewing the approximation instrument that specifically deals with participation in a criminal organisation. When looking into the sanctions included in the 2008 FD Organised Crime, Art. 3 with respect to natural persons refers to traditional sanctions involving deprivation of liberty and Art. 6 with respect to legal persons refers to the traditional sanctions including criminal and non-criminal fines and a set of suggested alternative sanctions.

The fact that disqualification from participation in a public procurement procedure is not included as a sanction in FD Organised Crime can be explained by the diversity in the approach member states have developed with respect to that and other types of disqualifications. Whereas some member states have included it into their criminal justice system as a sanction that can be imposed by a judge in the course of a criminal procedure, other member states have implemented it through restricting the access to *in casu* procurement procedures for persons that have been convicted in the past. In doing so, the disqualifications from participating in a public procurement procedure is not a

[402] Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law and Council Framework Decision 2005/667/JHA to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution *annulled and replaced by* Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.

sanction *sensu stricto* for it is not imposed by a judge. Nevertheless, it is important to recall that approximation consists of aligning the result, leaving the choice of form and methods up to the member states. From that perspective, it is very much possible to introduce a disqualification from participation in a public procurement procedure as a mandatory sanction for both natural and legal persons in the approximating Directives, leaving it up to the member states to decide whether this disqualification will be imposed in the course of a criminal justice procedure or will be implemented into the national law as a restriction with respect to the eligibility to participate in a public procurement procedure.

The recommendation to include the exclusion from participation in a public procurement procedure into the instruments that approximate the constituent elements of offences and their sanctions, would increase cross-instrument consistency. However, there are two other issues with respect to the interaction between the relevant EU instruments that require anticipation to ensure the proper applicability of these instruments. The second issue relates to the delineation of the offences in the procurement directive and linked to that the delineation of the mandatory exclusion grounds. The third issue relates to the availability of sufficiently detailed criminal records information to single out the convictions for which exclusion is mandatory following the provisions in the procurement directive.

2.2 Delineation of the approximated offences

The second issue relates to the delineation of the offences in the procurement directive and linked to that the delineation of the mandatory exclusion grounds. Interestingly, the scope of the offences and thus the exclusion obligations in the procurement directive is explicitly clarified through the introduction of a reference to an approximation instrument. At first sight this provision perfectly matches the first policy option developed above when elaborating on the disqualification triad, namely the introduction of approximated disqualifications for *approximated offences*.

- First, for participation in a criminal organisation, reference is made to the behaviour included in Art. 2(1) of the Council Joint Action 98/33/JHA;
- Second, for corruption, reference is made to the behaviour included in Art. 3 of the Council Act of 26 May 1997 and Art. 3(1) of the Council Joint action 98/742/JHA;
- Third, for fraud, a reference is made to Art. 1 of the Convention relating to the protection of the financial interests of the European Communities; and

- Fourth for money laundering, reference is made to Art. 1 of the Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering.

Though the references may reflect the status of approximation at the time of adoption of the Procurement Directive[403], the approximation acquis develops rapidly and it is only a matter of time before the scope (at least the legal basis) of the approximated parts of the offence labels included in the list has changed. This raises a number of concerns.

The first concern relates to the reference to Council Joint Action 98/33/JHA on participation in a criminal organisation to delineate the scope of participation in a criminal organisation.[404] The joint action referred to has been repealed and replaced by Council Framework Decision 2008/841/JHA on organised crime[405]. Fortunately, Art. 9 FD Organised Crime elaborates on the faith of outdated references to the joint action and clearly stipulates that "*references to participation in a criminal organisation within the meaning of Joint Action 98/733/JHA in measures adopted pursuant to Title VI of the Treaty on European Union and the Treaty establishing the European Community shall be construed as references to participation in a criminal organisation within the meaning of this new Framework Decision".* Even though from a technical legal perspective, there is no real problem and the reference to the joint action in the procurement directive should now be read as a reference to the framework decision, this approach requires that whoever is using the Procurement Directive is fully aware of any changes in the approximation acquis. This presumption or requirement of knowledge about the approximation acquis is far from ideal. The approximation acquis changes rapidly and procurement experts cannot be expected to be experts on offence approximation as well. At least, striving for consistent and user friendly policy making, it would make sense to warn the user of the Procurement Directive for the fact that the references are not kept updated. This can be done for example, by stipulating that the offence is defined in accordance to an identified article in any of the approximation instruments *"and the provisions amending and replacing that instrument"*[406]. There are two options to accommodate this concern. A first

[403] It is important to note that in the following paragraphs it will be made clear that even at the time of the adoption of the 2004 Procurement Directive, the instruments referred to provide an incorrect overview of the approximation acquis.

[404] Joint action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351 of 29.12.1998.

[405] Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime, OJ L 300 of 11.11.2008.

[406] This approach is copied from the approach used in the Europol Convention and the new Decision to define the unlawful drug trafficking. It is defined as *the criminal offences listed in*

option would be to introduce provisions into the approximation instruments that truly amend the references to repealed and replaced approximation instruments in any other EU instrument. Instead of stipulating that references to old instruments shall be construed as references to new instruments, the references are actually amended and replaced by a reference to the new instrument. This requires a thorough analysis of the entirety of the EU instrumentarium to catalogue all references to approximation instruments in other EU instruments and includes the inherent risk to miss some of the references. A second option would be to keep track of the approximation acquis in a separate document so that the specific reference to an approximation instrument can be lifted out of the procurement directive and replaced with a single reference to the *approximation acquis* as a whole, stipulating that the exclusion obligation relates to the said offence labels to the extent that they have been subject to approximation. To ensure transparency and not jeopardise the user-friendliness of the instrument, this approach requires that a consolidated approximation acquis is easily available for anyone to consult.

The second concern is more pressing. Whereas the first concern mainly relates to the user-friendliness of the procurement directive, and the presumptions of knowledge on the changes in the approximation acquis, the second concern relates to the questions that can rise when changes in the approximation acquis are not complemented with a provision stipulating that all references to the older instrument must be construed as references to the newer instrument. An example thereof can be found in the Council Joint Action 98/742/JHA on corruption in the private sector[407] which has been repealed by the Framework Decision 2003/568/JHA[408]. Unfortunately though, no explicit replacement provision – as found in the instruments on organised crime – is included in the instrument on corruption. Even though the framework decision can be interpreted to have the intention to replace the joint action so that references to the joint action should be construed as references to the framework decision, there is no explicit legal basis for a such interpretation, which might give rise to a legal conflict when determining whether or not a candidate falls within the scope of the mandatory exclusion grounds. If a new instrument changes the constituent elements of the offence and broadens the definition, there is no explicit legal basis to expand the scope of the exclusion ground accordingly. A candidate convicted for a type of corruption that has been added

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Article 3(1) of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in the provisions amending or replacing that Convention.

[407] Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, OJ L 358 of 31.12.1998.

[408] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192 of 31.7.2003.

to the offence definition in the new framework decision, will argue that his conviction falls outside the scope of the mandatory exclusion from participation in a public procurement procedure for his behaviour is not included in the definition found in the joint action that is referred to in the procurement directive, and the new approximating instrument does not stipulate that references to the old joint action should be construed as references to the new framework decision. Art. 8 FD Corruption for example merely stipulates that the joint action is repealed. It does not stipulate that the joint action is repealed *and replaced* as is done in some other framework decisions, let alone that it explicitly stipulate that references should be construed as references to the new FD Corruption. Taking account of this complexity, it is most unfortunate that the 2004 procurement directive includes a reference to a joint action that at the time of the adoption had already been repealed by the 2003 FD Corruption.[409] This discussion could have been avoided if the most recent approximation instrument was used to delineate the scope of the mandatory exclusion ground. This unfortunate introduction on an outdated reference comes to testify how challenging it can be to keep pace with the rapidly evolving approximation acquis.

The third concern relates to the potential coexistence of multiple definitions for the same offence label. To delineate the scope of money laundering, the procurement directive refers to Art. 1 of the Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering.[410] That instrument has copy pasted the definition of laundering offences as introduced in the 1990 Council of Europe Money Laundering Convention[411] into a EU instrument. Because a copy pasting exercise detaches the EU definition from the Council of Europe definition, an autonomous EU definition is created, be it at the time a perfect copy of the Council of Europe definition. However, in the following years also other EU instruments with respect to money laundering were adopted. Instead of using the existing EU definition as a basis to further develop the EU money laundering policy, a reference to the definition in the 1990 Council of European Convention was included in the 1998 Joint Action[412] which was subsequently repealed by the 2001

[409] This observation was also made by: Arnáiz, T. M. (2006). Grounds for exclusion in public procurement: measures in the fight against corruption in the European Union. International Public Procurement Conference Proceedings, 329.

[410] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166 of 28.6.1991

[411] Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8.XI.1990.

[412] Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime, OJ L 333 of 8.12.1998.

Framework Decision[413]. This means that two different approaches co-exists with respect to the definition of money laundering: on the one hand a copy pasted and therefore *autonomous* EU definition and on the other hand a referenced and therefore *Council of Europe-dependent* EU definition. Though currently still matching, this double approach runs the risk of creating two co-existing definitions at EU level in the event the definition at Council of Europe level is adapted and that adaptation would be pulled into the EU framework through the reference to the Council or Europe instrument included in the latest approximation instrument. Especially when the definition of money laundering is used to delineate the scope of obligations imposed on the member states, consistent EU policy making would strive to have one approximated EU definition (be it or not linked to the Council of Europe definition) that is used as a basis throughout EU policies.

The concerns with respect to the delineation of the approximated offences that in their turn delineated the scope of the mandatory exclusion from participating in a public procurement procedure, raise questions on the feasibility to tackle them and improve the approach currently used. Though it is necessary to clearly delineate the scope of the offences and the use of the approximation acquis to that end should be applauded, including explicit references to the approximation instruments cannot stand the test of time – as illustrated by the replacement of the joint action on organised crime with a framework decision on organised crime – and even runs the risk of being outdated to begin with – as illustrated by the reference to the 1997 joint action which was already repealed by the 2003 framework decision at the time the 2004 procurement directive was adopted. Alternatively, in order to avoid any discussion on the scope of the approximated offences and the legal basis to be used, a well-considered policy would stipulate that the offences are to be delineated as indicated in a separate instrument that contains an overview of the approximation acquis at any given time. To that end, information on the approximation acquis should be compiled in a separate instrument that is kept up to date and made available for any practitioner confronted with the situation that requires application of the approximation acquis. The recommendation to lift the references to approximation instruments out of the Procurement Directive and replace them with a single reference to the approximation acquis as a whole stipulating that the offences are to be interpreted in light thereof, could be further explored and elaborated on. Specifically with that added value

[413] Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182 of 5.7.2001.

in mind, EULOCS – short for EU level offence classification system – should be included in the discussion.[414]

EULOCS is a classification system that presents an overview of the approximation acquis. It makes a distinction between those parts of offences that have been subject to approximation and those parts of offences for which criminalisation is subject to national discretion. Additionally, each offence category is provided a code and for the approximated parts a reference to the legal basis is included as well as an updated version of the behaviour that has been subject to approximation.

Considering that mandatory exclusion grounds have been introduced for participation in a criminal organisation, fraud, corruption and money laundering, the following table is intended to provide insight into what EULOCS looks like.

0200 00 Open Category	**PARTICIPATION IN A CRIMINAL ORGANISATION**
Article 1 Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	"Criminal organisation" means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit; "Structured association" means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure
0201 00	OFFENCES JOINTLY IDENTIFIED AS PARTICIPATION IN A CRIMINAL ORGANISATION
0201 01	**Directing a criminal organisation**
Article 2 (b) , Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime	Conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences, even if that person does not take part in the actual execution of the activity.
0201 02	**Knowingly participating in the criminal activities,** *without being a director*
Article 2 (a), Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's criminal

[414] G. VERMEULEN and W. DE BONDT (2009). *EULOCS. The EU level offence classification system : a bench-mark for enhanced internal coherence of the EU's criminal policy*, Antwerpen-Apeldoorn-Portland: Maklu.

against organised crime	activities, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the member state concerned, even where the offences concerned are not actually committed,
0201 03	**Knowingly taking part in the non-criminal activities of a criminal organisation,** *without being a director*
Article 5 - United Nations Convention on Transnational Organised Crime (UNTS no. 39574, New York, 15.11.2000)	Conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in the organisation's other activities (i.e. non-criminal) in the further knowledge that his participation will contribute to the achievement of the organisation's criminal activities.
0202 00	**OTHER FORMS OF PARTICIPATION IN A CRIMINAL ORGANISATION**
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy

[...]

0905 00	**CORRUPTION**
Annex to the Convention of 26 July 1995 on the establishment of a European police office	This category is listed without further explanation.
0905 01	**Offences jointly defined as corruption**
0905 01 01	Active corruption in the public sector involving a EU public official
Article 3.1 of the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of member states of the European Union	The deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption. EU public official (community official) shall mean any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities; or any person seconded to the European Communities by the member states or by any

	public or private body, who carries out functions equivalent to those performed by European Community officials or other servants
0905 01 02	Passive corruption in the public sector involving a EU public official
Article 2.1 of the Convention of 26 May 1997 on the fight against corruption involving officials of the European Communities or officials of member states of the European Union	The deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute passive corruption. EU public official (community official) shall mean any person who is an official or other contracted employee within the meaning of the Staff Regulations of officials of the European Communities or the Conditions of Employment of other servants of the European Communities; or any person seconded to the European Communities by the member states or by any public or private body, who carries out functions equivalent to those performed by European Community officials or other servants
0905 01 03	Active corruption in the private sector
Article 2.1(a) of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector[415]	promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties
0905 01 04	Passive corruption in the private sector
Article 2.1(b) of the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector	directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties
0905 02	Other forms of corruption
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy

[415] Art. 8 FD Corruption stipulates that Joint Action 98/742/JHA – the instrument referred to in the 2004 Procurement Directive – shall be repealed.

0906 00	MONEY LAUNDERING
	"Money laundering" or laundering of proceeds of crime "proceeds", consists of any economic advantage from criminal offences.
0906 01	**Offences jointly identified as Money Laundering**
0906 01 01	The conversion or transfer of property
Article 6(1) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	The illicit conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions
0906 01 02	The illicit concealment or disguise of property related information
Article 6(1) of CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property is proceeds
0906 01 03	The illicit acquisition, possession or use of laundered property
Article 6(1) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime	The acquisition, possession or use of property, knowing, at the time of receipt, that such property was proceeds.
0906 02	Other forms of Money Laundering
	Rest category, as the jointly identified forms an on offences type only constitute a minimum definition, and States are allowed to uphold a more strict criminal policy

[...]

0908 00	FRAUD AND SWINDLING
0908 01 04	Fraud affecting the financial interests of the European Communities
Article 1 of the Convention of 26 July 1995 on the protection of the European Communities' Financial Interests	Fraud affecting the financial interests of the European Communities, includes: Expenditure fraud meaning: - The use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets

	managed by, or on behalf of, the European Communities - The non-disclosure of information in violation of a specific obligation, with the same effect - The misapplication of such funds for purposes other than those for which they were originally granted Revenue fraud means: - The use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities - The non-disclosure of information in violation of a specific obligation, with the same effect - The misapplication of a legally obtained benefit, with the same effect

In practice, using EULOCS as a reference tool would mean that legal instruments such as the procurement directives would no longer need to include an *ad nominem* reference to the approximation instrument that constitutes the legal basis for the scope demarcation of the mandatory exclusion grounds, but include a reference to EULOCS and clarified that in EULOCS it is indicated which approximated parts of offences[416] are included in the scope of the mandatory exclusion ground.

In accordance to the old approach, the scope of the exclusion ground will be delineated stipulating that participation in a criminal organisation is defined *in Art. 2(1) of the Council Joint Action 98/33/JHA*; In accordance to the suggested EULOCS approach, it would be stipulated that the scope of participation in a criminal organisation as an exclusion grounds is to be delineated as indicated *in the EU level offence classification system*.

This also means that discussions on the adoption or alternation of approximation instruments should include the relation between the new or altered approximated offence and the mirroring scope of the approximated disqualifications. By working with EULOCS as a reference tool, it will also be possible to extend the scope of the approximated offence, i.e. extend the obligation for member states to criminalise the behaviour included in the instrument, but at the same time stipulate that the obligation to attach a disqualifying effect to a conviction in the course of a public procurement

[416] It should be noted that using EULOCS as a reference tool also opens the possibility to make a selection within an approximated offence. It is not a given that the extension of the approximation immediately entails an extension of the exclusion ground. Because EULOCS works with a categorisation system that differentiates between different categories of behaviour included in one offence label, it is possible to use that level of detail in the identification of the behaviour for which conviction should lead to exclusion.

procedure remains the same. In other words, the inclusion of approximated behaviour in separate categories of EULOCS allows for a very detailed differentiation between offences for which a conviction is automatically complemented with a disqualification from entering in a procurement procedure and a conviction for which no such mandatory exclusion is foreseen. This recommendation rounds out the discussion on the second issue, being the delineation of the offences for which exclusion is mandatory.

2.3 Access to detailed information

The third issue relates to the availability of sufficiently detailed criminal records information to single out the convictions for which exclusion is mandatory following the provisions in the procurement directive. Besides the clear demarcation of the scope of the approximated offences and thus the approximated disqualification obligation, the proper functioning of disqualification obligations is also dependent on the availability of (sufficiently detailed) conviction information to determine whether or not a case falls within the scope of the disqualification obligations. In spite of the extensive critiques raised with respect to the functioning of these mandatory exclusion grounds (e.g. with respect to the scope *ratione personae*[417], the scope *ratione temporis,*[418] the scope *ratione auctoritatis*[419] and the *outdated character*[420] of the references to clarify the scope of the offence labels), analysis has never touched upon the feasibility to adhere to the obligation and disqualify a candidate that has been convicted for any of the listed offences due to the unavailability of sufficiently detailed criminal records information. Adhering to the obligation to exclude a candidate

[417] See e.g. T. M. ARNÁIZ (2006) Grounds for exclusion in public procurement: measures in the fight against corruption in the European Union. *International Public Procurement Conference Proceedings,* p 329-352; S. ARROWSMITH, (2004) As assessment of the new legislative package on public procurement. *Common Market Law Review*, 41, p 1277-1325, P.-A. TREPTE (2007), *Public Procurement in the EU.* Oxford: Oxford University Press.

[418] See e.g. S. ARROWSMITH, (2004) As assessment of the new legislative package on public procurement. *Common Market Law Review*, 41, p 1277-1325, , P.-A. TREPTE (2007), *Public Procurement in the EU.* Oxford: Oxford University Press at 341; T. M. ARNÁIZ (2006) Grounds for exclusion in public procurement: measures in the fight against corruption in the European Union. *International Public Procurement Conference Proceedings,* p 329-352; E. PISELLI, (2000) The scope for excluding providers who have committed criminal offences under the E.U. Procurement Directives. *Public Procurement Law Review*, 6, p 267-286.

[419] It has been argued that a strong criminal policy essentially needs to include the private sector in the regulatory framework. See e.g. I. CARR, (2007) Fighting Corruption through Regional and International Conventions: A Satisfactory Solution? *European Journal of Crime, Criminal Law and Criminal Justice,* p 121-153

[420] T. M. ARNÁIZ (2006) Grounds for exclusion in public procurement: measures in the fight against corruption in the European Union. *International Public Procurement Conference Proceedings,* p 329-352.

for having been convicted for any of the listed offences requires that convictions for those offences can be identified and singled out in the midst of other existing convictions. This requires a review of the level of detail in the conviction information that is (made) available to contracting authorities.

When reviewing the access to criminal records information for sensitive sector-actors such as contracting authorities in a procurement context, different regimes were identified. Some member states allow the contracting authorities direct access to the criminal records databases. Other member states work with certificates of non prior conviction. Either way it is important that the information provided can differentiate between offences that have been subject to approximation and offences for which no approximated definition and therefore no approximated disqualification exists. Based on previous research on the architecture and content of the national criminal records databases[421], it is safe to say that in the current format, member states cannot make a distinction between a money laundering conviction that relates to money laundering as found in the approximation instrument and a money laundering conviction that relates to a type of money laundering that is nationally criminalized under the label of money laundering beyond the minimum requirement. Though a lot has happened with respect to criminal records in the last decade, the new policy with respect to criminal records information cannot positively adjust that presumption. The limited importance attached to completing information on an existing conviction with detailed information on the underlying offence when designing the new European Criminal Records Information System illustrates this. From 7 April 2012 onwards, the criminal records information exchange will be governed by the 2009 framework decision on the organization and content of criminal records databases[422] complemented by the 2009 decision on the development of ECRIS[423], short for European criminal records information system. When reviewing the level of detail introduced in the coding system that will govern the future criminal records exchange, it is clear that it is not deemed important to be able to distinguish between convictions that relate to an

[421] See e.g. G. VERMEULEN, T. VANDER BEKEN, E. DE BUSSER, A. DORMAELS (2002) *Blueprint for an EU criminal records database*, Antwerpen-Apeldoorn: Maklu; SCHMITZ, P.-E., MENNENS, A., VANHECKE, R., DE WEVER, W., AISOLA, K., FLAMMANG, M., BOURJAF, A., DUBOIS, O., VERMEULEN, G., VAN PUYENBROECK, L., (2006) *Review of National Criminal Records Systems in the European Union, Bulgaria and Romania with the view to the Development of a Common Format for the Exchange of Information on Criminal Records*, Brussel: Unisys: STEFANOU, C., & XANTHAKI, H. (2008). *Towards a European Criminal Record*. Cambridge: Cambridge University Press.

[422] Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, OJ L 93 of 7.4.2009.

[423] Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ L 93 of 7.4.2009

approximated part of an offences and convictions that relate to behaviour that were nationally added to an offence label. For money laundering, only one reference code is included in the ECRIS coding system, namely 1504 covering *laundering of proceeds from crime*. The lack of detail that results from it is most unfortunate considering that for a lot of mechanisms that take account of convictions such as exclusion grounds, more detailed information on the behaviour underlying the convictions is necessary. From this perspective the information exchanged can only provide an indication of an existing conviction that may result in an exclusion and always requires that additional information is sought. Nevertheless, the ECRIS coding system can be easily upgraded by introducing a distinction between convictions related to the *jointly identified part* of money laundering and convictions related to *other forms* of money laundering, mirroring the approach used when developing EULOCS.

It can therefore be concluded that the lack of sufficiently detailed criminal records information constitutes a significant obstacle to the proper functioning of the approximated exclusion grounds for the approximated offences found in the legal instruments governing the access to public procurement proceedings. In today's reality, it is not possible to make the necessary distinctions to uphold the exclusion obligation. Based on the information available in the criminal records information systems it will never be possible to determine whether or not the behaviour underlying the conviction matches with the behaviour that should give rise to exclusion from participation in a procurement procedure. In practice, that knowledge can only be gathered when conducting a case analysis, looking into the description of the facts in the conviction.

In light of this limited detail in the criminal records information available in general and therefore also available to the contracting authorities in a procurement procedure, the question arises to what extent it is a problem to exclude candidates for having been convicted for offences beyond the minimum requirements found in the procurement directives. After all, mandatory exclusion grounds found therein are only a minimum requirement. Member states are allowed to introduce a more stringent regime at national level. If member states legislate that candidates are excluded for having been convicted for *any type* of money laundering, the minimum requirement is surely fulfilled. The question therefore arises whether knowing that someone was convicted for '*a*' money laundering offence corresponding to code 1504 in ECRIS cannot suffice and automatically lead to exclusion. This discussion on the acceptability of legislation that will exclude candidates for having been convicted for behaviour beyond the approximation acquis forms the central question with respect to the functioning of attaching equivalent disqualifications to foreign convictions as attached to national convictions and will therefore be dealt with in the following section. The link between being disqualified from participating

in a public procurement procedure and mutual recognition will be dealt with as the final item of this case study.

3 Attaching an equivalent disqualifying effect to foreign convictions

The second policy recommendation consists of extending the requirement to attach to a foreign conviction a disqualifying effect that is equivalent to the disqualifying effect a national conviction would evoke. That policy option links in with the equivalency principle underlying the framework decision on the taking account of foreign convictions in the course of new criminal proceedings (abbreviated to FD Prior Convictions), that recently entered into force.[424]

In the 2008 FD Prior Convictions, the member states committed themselves to take account of foreign prior convictions in the course of new criminal proceedings and attach effects to them that are equivalent to the effects attached to a prior national conviction. Art. 3 reads that *previous convictions handed down against the same person for different facts in other Member States are taken into account to the extent previous national convictions are taken into account, and that equivalent legal effects are attached to them as to previous national convictions, in accordance with national law.* The effect of a prior conviction in a new criminal procedure can be dependent on the underlying offence and/or the sanction imposed.[425] As a second branch of the disqualification triad, it is recommended to extend that commitment to encompass also the obligation to take account of foreign convictions in the course of a procurement procedure. Considering the inherent cross-border character of the EU procurement directives which are intended to support and facilitate participation in procurement procedures outside the candidate's member state[426] and considering that conviction related exclusion grounds are introduced at EU level to protect the contracting authority from entering into a contractual relationship with an unreliable candidate[427], an

[424] Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, OJ L 220 of 15.8.2008.

[425] See more in detail: W. DE BONDT (forthcoming), Cross-border recidivism in the EU: Fact or Fiction?

[426] COM(2011) 15 final, Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market, Communication adopted by the European Commission on 27 January 2011.

[427] T. M. ARNÁIZ (2006) Grounds for exclusion in public procurement: measures in the fight against corruption in the European Union. *International Public Procurement Conference Proceedings,* p 329-352 at 337; E. PISELLI, (2000) The scope for excluding providers who have committed criminal offences under the E.U. Procurement Directives. *Public Procurement Law*

extension of the equivalency principle to procurement procedures is in line with the philosophy underlying the elaboration of an EU procurement policy.

3.1 Transferability concerns

Prior to transferring a principle from one context into another, it must be assessed whether the specificities of the new context give rise to transferability concerns. In other words, it is important to thoroughly assess to what extent it is feasible to transfer an existing principle into another context and to what extent it is necessary to adapt the principle or complement it with correction or flanking measures for it to work properly. The transferability concern here relates to the position of duality with respect to the underlying offence or the imposed sanction when taking account of foreign convictions in the course of a procurement procedure. In the following paragraphs, the line of argumentation will be developed in relation to the duality with respect to the underlying offence (i.e. the double criminality requirement). That line of argumentation applies mutatis mutandis also to the duality with respect to the imposed sanction.

Double criminality is *not* a mandatory but an optional requirement when taking account of foreign convictions in the course of a criminal procedure. When analyzing the equivalency principle as introduced in the FD Prior Convictions, it becomes clear that the commitment to take account of foreign convictions is not unlimited. Recital 6 clearly provides that the obligation to take account of and give effect to foreign convictions does not stretch to encompass a conviction that could not have existed under national law for reasons of lacking double criminality. It stipulates that *this framework decision contains no obligation to take into account such previous convictions […] where a national conviction would not have been possible regarding the act for which the previous conviction had been imposed […]*[428]. This means that the member states are not obliged to take account of a foreign conviction if the underlying behaviour is not equally criminalized under their national law. However, the framework decision does not prohibit such effects. Therefore, it is left up to the member states to decide whether or not effects are attached to foreign prior convictions that do not meet the so-called double criminality test. In the course of a criminal proceeding it is possible to take account of foreign convictions – even beyond the double criminality

Review, 6, p 267-286 at 268; S. WILLIAMS. (2009). The Mandatory Contractor Exclusions for Serious Criminal Offences in UK Public Procurement. *European Public Law*, 15(3), at 432.

[428] The sentence continues with '*or where the previously imposed sanction is unknown to the national legal system'* supporting that the argumentation developed applies mutatis mutandis also to the duality with respect to the imposed sanction.

requirement – to the extent that the national law of the prosecuting member state allows it. Double criminality is an optional refusal ground.

The question arises whether double criminality should be a mandatory or optional refusal ground when taking account of foreign convictions in the course of a public procurement procedure. The relevance of that question can be illustrated using the following example. Two candidates – applying for the same public contract – operate under the jurisdiction of two different member states. The difference in jurisdiction can raise double criminality issues in that the same behaviour may be qualified differently. Whereas one candidate can present behaviour without criminal consequences, the other candidate risks criminal proceedings because the behaviour is criminalized in the jurisdiction it operates in. Not only will prosecution and conviction for the said behaviour be regarded as unfair when the candidate compares itself with its competitors operating under the jurisdiction of another member state, the situation will be regarded as even more unfair if the conviction results in being excluded from participation in a procurement procedure, whereas the other candidate could never have been convicted – let alone excluded – while presenting the exact same behaviour. Especially when the main objective underlying the public procurement directives in the EU relate to creating the conditions of competition necessary for the non-discriminatory award of public contracts, access to a true single market and the reinforcement of competition amongst European enterprises[429], this feeling of unfair and unequal treatment cannot be ignored. It should be noted that this concern therefore extends beyond the question whether *foreign* convictions can be taken into account if the underlying behaviour is not equally criminalized in the jurisdiction of the contracting authority. The question is broader and looks into whether convictions – foreign or national – can be taken into account if the underlying behaviour is not equally criminalized in the jurisdictions in which the other candidates operate, regardless of the jurisdiction of the contracting authority. To that end, the position of double criminality in the national implementation legislation should be carefully analysed.

[429] Green Paper on Public Procurement in the European Union: Exploring the way forward, Communication adopted by the Commission on 27 November 1996; WILLIAMS, S. (2009). The Mandatory Contractor Exclusions for Serious Criminal Offences in UK Public Procurement. European Public Law, 15(3), 429; Green paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market, Communication adopted by the European Commission on 27 January 2011.

3.2 Different national approaches

The application of the equivalency principle as found in the context of taking account of foreign convictions in the course of a criminal procedure is dependent on the formulation of the national law. Therefore a transfer to apply it also in the context of taking account of foreign convictions in the course of a public procurement procedure will be equally dependent on the formulation of the national law. In light thereof, it is necessary to first look into the provisions in the national law of each of the member states to assess to what extent the double criminality requirement has received a central position therein, and whether the question on the faith of both foreign and national convictions for which the underlying behaviour is not equally criminalized in the jurisdictions in which co-competitors operate has not been already sufficiently and adequately tackled. The procurement directive has introduced mandatory exclusion grounds for candidates that have been convicted for participation in a criminal organization, fraud, corruption and/or money laundering, avoiding feelings of unequal treatment by limiting the scope of the exclusion ground to approximated offence. It is interesting to see how member states have implemented that provision and to what extent member states have tackled the questions related to the position of foreign convictions and the double criminality requirement more in general.

The fact that the Procurement Directive provides little guidance on how to implement this provision and how wide member states are allowed to introduce mandatory exclusion grounds for convicted candidates, has led to different implementation approaches. When assessing how member states have used their implementation discretion, roughly two different approaches can be distinguished.

A first type of member states has clearly identified the behaviour for which convictions will lead to exclusion. On the one hand reference can be made to Sweden who has introduced minimalist exclusion grounds through limiting the scope thereof to the offences the way they are commonly defined in the European instruments.[430] In doing so Sweden has limited the scope of the exclusion grounds to having been convicted for behaviour that is known to be criminalised throughout Europe. Because exclusion is only based on convictions for which the underlying behaviour is known to be criminalised throughout Europe, double criminality is guaranteed and the exclusion grounds are in effect exactly the same for all competing candidates. There will be no feelings of unfairness when applying the Swedish exclusion provisions. Apparently,

[430] Chapter 10 Art. 1 Swedish Public Procurement Law, SFS 2007:1091.

Sweden did not consider it problematic not to be able to exclude candidates for having been convicted in Sweden for behaviour that is not included in the minimum requirement introduced in the procurement directive. Germany on the other hand too has clearly identified the behaviour for which a conviction will lead to exclusion, but it has not used references to EU level instruments to clarify the scope of the exclusion grounds, but referred to provisions in its own criminal code to determine the behaviour for which conviction will lead to exclusion. §11a 2(1) German Procurement Law lists the relevant provisions of the criminal code. The first exclusion ground stipulates that convictions will lead to exclusion if they relate to *"§ 129 of the Criminal Code (criminal organizations, education), § 129a of the Criminal Code (Formation of terrorist organizations), § 129b of the Criminal Code (criminal and terrorist organizations abroad)"*. This means that the scope of the exclusion ground is not necessarily limited to the behaviour included in the EU level instruments and Germany has used its discretion to introduce a more severe policy at national level, also excluding convictions for behaviour that is not included in the approximation instruments. Bulgaria too has complemented the national offence labels with the references to its national criminal code.[431]

In doing so, double criminality will only be guaranteed in one direction. Candidates with a foreign conviction will only be excluded to the extent double criminality is guaranteed with respect to the national (*in casu* German) criminal law of the contracting authority. However, this does not guarantee that their conviction will only be taken into account to the extent that the underlying behaviour is equally criminalised in the jurisdictions in which the competitors operated, for double criminality is only tested using the criminal law of the (German) contracting authority as a guideline, regardless of double criminality with the jurisdictions in which competitors have operated. Similarly, candidates with a national (German) conviction will not have the guarantee that their conviction will only be taken into account to the extent that the underlying behaviour is equally criminalised in the jurisdictions in which the competitors operated. Situations may occur in which a candidate is excluded for having been convicted in Germany for behaviour that does not constitute an offence in the other member states, which may be perceived as unfair.

A second type of member states has not explicitly indicated for which underlying behaviour convictions will lead to exclusion. The use of undefined offence labels leaves significant room for interpretation. Some member states – though having copied the wording of Art. 45(1) of the Procurement Directive – have not bothered to also copy the references to the European instruments into

[431] Art. 47 Bulgarian Public Procurement Law, SG n° 28 of 6 April 2003 lastly amended by SG n° 79 of 26 September 2008.

their national implementation legislation and have merely copied the offence labels. In doing so, Lithuania and Romania have not given any indication on how to interpret the offence labels.[432] leaving us with the presumption that they should be interpreted in light of the national (criminal) meaning thereof, though much can be said also for an interpretation in light of the mother provision in the directive, and even an interpretation including any criminalisation underneath that label in any other member state can be defended. Other member states have reinterpreted the offence labels *itself* in accordance with the labels used in their national criminal code, suggesting that the scope of the labels must be interpreted in light of the scope of the criminalisation in the national criminal code. The Czech Republic has clarified that candidates will be excluded for having been finally sentenced for *"crimes committed to the benefit of a criminal conspiracy, by participation in criminal conspiracy, legislation on proceeds of criminal activity, accessoryship, accepting bribes, bribery, indirect bribery, fraud, loan fraud."*[433] Even though the reformulation of the offence labels strengthens the presumption that their scope is to be interpreted in light of the criminalisation provisions in the national criminal code, from a strict legal perspective the wording of the national implementation provision is technically inconclusive.

Within those two implementation typologies (i.e. either or not explicitly including for which behaviour a conviction will lead to exclusion) only few national implementation legislations explicitly deal with the differences in the criminalisation legislation of the member states. In doing so, the Hungarian legislation falls within the second category described above. Interestingly, in addition to clarifying how it will deal with national situations, Art. 60(3) Hungarian Public Procurement Law clarifies that for candidates established in another member state of the European Union, the exclusion grounds will be as mentioned in Art. 45(1) of the Procurement Directive.[434] The Hungarian implementation legislation takes account of the fact that in a public procurement procedure, it might be confronted with foreigners and foreign convictions. For those foreigners the scope of the exclusion ground is limited in the same way Sweden has limited the exclusion grounds – mirroring the minimum requirement introduced in the directive – though Sweden did not differentiate between national and foreign candidates. This approach can be criticised though, for the applicability of criminal law is not dependent on the nationality of the person involved. It may very well be that a person established abroad is

[432] Art. 33 Lithuanian Public Procurement Law (Law of 13 August 1996 on Public Procurement, I-1491 as amended by Law 22 December 2005, X-471), and Art. 180 Romanian Public Procurement Law (Law regarding the award of the public procurement contracts, public works concession contracts and services concession contracts, Official Gazette 15 May 2006, I-418).

[433] §53 (1)(a) Czech Public Procurement Law (Act No 137 of 14 March 2006 on public contracts, last amended by Act 178/2010).

[434] Art. 60(3) Hungarian Procurement Law (Törvény közbeszerzésekröl szóló, 2003; évi CXXIX).

convicted by a Hungarian judicial authority. Technically, this means that the Hungarian conviction cannot be used as a ground for exclusion when it relates to behaviour that is not included in the approximation instruments.

Alternatively, whilst Art. 23(1) a-e UK's Public Procurement Law reinterprets the offences listed in Art. 45(1) in light of the UK criminal law[435], its Art. 23(1) f adds that also convictions for *"any other offence within the meaning of Art. 45(1) of the Directive as defined by the national law of any relevant state"* will lead to exclusion. In doing so, the UK's Public Procurement Law does not differentiate between national and foreign candidates, but between national and foreign convictions. With respect to national convictions, the national criminal law applies and with respect to foreign convictions, foreign criminal law applies, though that foreign law is limited to mirror the scope of the mandatory exclusion grounds in the procurement directive.

The fact that some member states have not dealt with the topic of foreign convictions in their national legislation and other member states have not developed a uniform way to deal with foreign convictions and more broadly the concerns related to the double criminality requirement, necessitates an analysis on whether or not the feeling of unfair treatment when excluded for having been convicted for behaviour that is not equally criminalized in the jurisdictions in which the competitors operated can be substantiated to give rise to an unequal treatment problem that would stand in court.

3.3 Equal treatment limits to exclusion grounds

The feeling of unfair treatment originates from the argumentation that candidates are not treated equally because they could not have been convicted equally for the same behaviour (i.e. the underlying the conviction) for it is not criminalised equally throughout the jurisdictions they operate in.

Equal treatment is a basic principle in European law.[436] Its importance in the context of public procurement is recognised by its explicit inclusion in Art. 2 Procurement Directive, and additionally the Court of Justice has clarified that even where it is not explicitly included in the body of the text, the principle is so fundamental, that procurement cannot function without it. In the *Storebælt* case the ECJ had to judge a Danish call for tender with respect to the construction of a

[435] In doing so, the UK's legislation falls within the first category described above.

[436] C. MCCRUDDEN, (2009). "EC public procurement law and equality linkages: foundations for interpretation", in ARROWSMITH, S. and KUNZLIK, P., Social and environmental policies in EC procurement law. New Directives and New Directions, Cambridge, Cambridge University Press, 2009, p 271-309; DRIJBER, B. J., & STERGIOU, H. (2009). Public Procurement law and internal market Law. Common Market Law Review, 46, 805.

bridge, which required all candidates to use as much as possible Danish resources. One of the candidates took this matter to court arguing that such a requirement would result in the unequal treatment of foreign candidates. It was argued that Danish resources are better known and more accessible for Danish candidates. With the *Storebælt* case, the ECJ clarified that even where directives do not expressly mention *in casu* the principle of equal treatment of candidates, the duty to observe that principle lies at the very heart of the directive whose purpose it is to ensure the development of effective competition in the field of public contracts and which lays down criteria for selection and for award of the contracts by means of which such competition is to be ensured.[437] The principle requires an objective comparison of the tenders submitted by the various candidates.[438] The same reasoning can also be found in several other cases.[439] Undeniably, equal treatment is a fundamental principle in a public procurement context and the interpretation and application of procurement legislation should be done with respect for the equal treatment principle.

Equal treatment requires that equal situations are treated in an equal manner and different situations are treated in a different manner.[440] Though that might seem self-evident as a baseline, the application thereof in practice is far from self-evident. The difficulty in this case study with respect to conviction-related exclusion grounds consists of determining which *situations* should be compared and assessed for equality. Should the *behaviour* be used as a baseline, or should it be the *criminalisation/conviction*.

[437] ECJ, Case C-243/89 Storebælt, 22 June 1993, at §33.

[438] ECJ, Case C-243/89 Storebælt, 22 June 1993, at §37. *In casu* the ECJ decided that the requirement to use domestic resources would amount to an unequal treatment of the foreign candidates.

[439] See e.g. ECJ, Case C-13/63 Italy v. Commission, 17 July 1963; ECJ, Case C-304/01 Spain v. Commission, 9 September 2004; ECJ, Case C-210/03, Swedish Match, 14 December 2004.

[440] See e.g. ECJ, Joint cases C-21/03 and C-34/03 Fabricom, 3 March 2005, at §27; ECJ, Case C-434/02 Arnold André, 14 December 2004, at §68, Case C-210/03 Swedish Match, 14 December 2004, at §70.

The table inserted below is meant to illustrate how that would influence the outcome of the equality assessment.

	Behaviour	Criminalization
Candidate 1	Same	Yes
Candidate 2	Same	No
Interpretation	Same behaviour = same situation = same treatment?	Different criminalization = different situation = different treatment?

When taking the behaviour itself as a basis, equal treatment would mean that the same behaviour is regarded as the same situation and thus requires the same treatment. This means that considering the behaviour is not criminalized in one of the jurisdictions under which one of the candidates operates, and therefore no (conviction) information is available on whether or not that candidate has presented the behaviour, the said behaviour cannot lead to an exclusion. Same behaviour should have the same consequences in the context of a public procurement situation.

When taking the criminalization as a basis, the situations are different in that candidates 1 has committed criminalized behaviour and candidate 2 has not committed any criminalized behaviour. Taking this perspective as a baseline, the situations are different and therefore a difference in treatment can be justified.

To decide which of both scenarios results in *equal treatment* as required by the Court of Justice, it is required to look into the court's case law. To that end, it is interesting to first examine the court's opinion with respect to the criminalization diversity in the member states. If the mere fact that behaviour is criminalized in one member state and is not in another gives rise to an unequal treatment problem, the choice between both scenarios would be clear. In that case, diversity in criminalization amounts to unequal treatment, which would mean that the only acceptable scenario is a scenario in which convictions are only taken into account to the extent that the underlying behaviour would also lead to a conviction in the other member states. The question whether or not the diversity in criminal law amounts to unequal treatment was subject to debate in the *Hansen & Søn* case. That Danish transport and logistics company was being prosecuted in its capacity as the employer of a driver on the grounds that the latter had infringed certain provisions with respect to the maximum daily

driving period and the compulsory daily rest period.[441] The Danish legislator had introduced a system of strict criminal liability of legal persons when implementing the European minimum standards with respect to those driving regulations. *Hansen & Søn* argued that the risk of being convicted is now greater in Denmark when compared to that risk in another member state as a result of which competition within the common market is distorted.[442] The court however clarifies that the economic consequences of an infringement vary not only according to the system of criminal liability introduced by the member state in question but also according to the level of the fine imposed and the degree of effectiveness of the checks carried out. Accordingly, the introduction of a system of strict criminal liability does not *in itself* involve a distortion of the conditions of competition.[443] Unfortunately, what would involve a distortion of the conditions of competition in the internal market is not included in the judgment.[444] *Hansen & Søn* have not asked the right question to receive an answer thereto. The mere diversity in criminal law is not the problem, neither is the application thereof. Anyone operating under the jurisdiction of the Danish criminal law will be treated equally. Anyone operating under the jurisdiction of any other criminal law system that has introduced a different system of attributing liability to (legal) persons will be treated equally. There is no overarching obligation for all member states to legislate and criminalise behaviour in the same manner. Each member state is the master of his own criminal justice system and has the prerogative to decide which behaviour is criminalised and which behaviour is kept outside the criminal justice sphere.

Even though the diversity *in itself* does not involve a distortion of the conditions of competition, this does however not mean that the diversity in criminalisation cannot amount to unequal treatment *in a specific context*, especially a context that does require that everyone is treated equally. Where no overarching obligation exists to criminalise behaviour equally throughout the Union, an obligation does exist to ensure the equal treatment of all competing candidates in a procurement procedure. It is submitted that not the difference *in itself* is problematic, but the *consequences* of that difference in a procurement procedure are problematic. As soon as candidates with convictions handed down by different member states are compared in a public procurement procedure – in which equal treatment is a fundamental principle – the

[441] Art. 7-11 Regulation (EEC) No 543/69 of 25 March 1969 on the harmonization of certain social legislation relating to road transport, OJ L 160 of 17.6.1974.
[442] ECJ, Case C-326/88 Hansen & Søn, 10 July 1990, § 13.
[443] ECJ, Case C-326/88 Hansen & Søn, 10 July 1990, § 15.
[444] A. KLIP (2009). *European Criminal Law. An integrative Approach* (Vol. 2, Ius Communitatis). Antwerp - Oxford - Portland: Intersentia, p 92.

differences must be neutralised to ensure that competition is not distorted by the diversity in criminalisation in the member states.

Equal treatment in its purest form requires that the differences between the criminal justice situations of the member states are neutralized and account is taken of the behaviour that has been presented by the candidates.

The implementation thereof requires that behaviour is only taken into account to the extent that reliable information on the commission of that behaviour is available regardless of the jurisdiction in which a candidate operates, i.e. to the extent that information on convictions for that behaviour is available, i.e. to the extent that the behaviour is criminalized throughout the EU. Differently put, this means that convictions can only be taken into account to the extent that they relate to behaviour that would equally constitute an offence in the jurisdictions in which the other actors operate. Exclusion can only be based on convictions that relate to behaviour that represents the largest common denominator amongst the criminalizations.

In practice, the identification of the largest common denominator can be done in two ways: either the largest common denominator is identified prior to the start of the public procurement procedure based on the largest common denominator in the *entirety* of the EU, or the largest common denominator is identified *ad hoc* using the background of the tendering candidates within a specific public procurement case as a basis.

The first option would result in a common denominator from an EU wide perspective, reflecting the common denominator amongst the 27 member states. This option is a maximalist option, for it includes all 27 member states in the analysis. However, the more member states involved in the analysis, the smaller the largest common denominator will be. The biggest advantage of this approach is the fact that the largest common denominator will be the same for each public procurement procedure, regardless of the member state in which the procedure takes place. Exclusion is transparent and predictable. This also means that the quest to identify the largest common denominator can be a common project supported by each of the 27 individual member states, in cooperation with the European Union. An overview needs to be produced clearly delineating the behaviour that is criminalized throughout the EU. An important step in that direction was taken with the development of the EU level offence classification system, abbreviated to EULOCS.[445] As clarified above, EULOCS is a classification system that provides an overview of the offences that have been subject to approximation and in doing so provides an overview of the behaviour that was

[445] G. VERMEULEN and W. DE BONDT (2009). *EULOCS. The EU level offence classification system : a bench-mark for enhanced internal coherence of the EU's criminal policy* (Vol. 35, IRCP-series). Antwerp - Apeldoorn - Portland: Maklu.

jointly identified as criminal and *other forms* of behaviour that may be subject to criminalization upon a national decision to do so. The approximation acquis as presented in EULOCS will provide valuable information for the identification of the largest common denominator amongst the member states as it provides an overview of the smallest common denominator. At least those offences that have been subject to approximation are common. Because the set of offences for which approximating instruments have been adopted is relatively limited, it is highly likely that a lot more will be common. Should the member states want to be able to exclude candidates for offences beyond what is approximated, additional comparative legal analysis will be necessary to delineate the largest common denominator.[446]

The second option would result in an *ad hoc* identification of the largest common denominator, taking account of the specific profiles of the candidates participating in a specific public procurement procedure. After all, equal treatment must be ensured between the *actual* participants in a public procurement procedure and does not need to be ensured in relation to *hypothetical* candidates that did not participate. Based on the specific profiles of the participating candidates, the number of member states in the analysis may be reduced. A such analysis might result in an *ad hoc* largest common denominator that includes behaviour that would not make it to the *EU* largest common denominator. The identification of such an *ad hoc* largest common denominator requires taking account of the criminal law of the member states represented by the nationalities of the competing candidates as well as the 'nationality' of the convictions they hold.

In sum, the reasoning based on the equal treatment principle leads to the conclusion that attaching equivalent disqualifying (*in casu* excluding) effect to foreign prior convictions in the course of a public procurement procedure is compatible with the equal treatment requirement under the condition that disqualifying (*in casu* excluding) effect is only attached to convictions for which

[446] The question arises whether limiting the taking account of foreign convictions to the approximation acquis still has an added value compared to the first technique in the disqualification triad, i.e. approximated disqualifications for approximated offences. To clarify the added value, two comments need to be made. First, no approximated disqualifications exists for all offences that have been subject to approximation. Therefore, the technique of attaching equivalent effect to a foreign conviction for which the underlying behaviour relates to the approximation acquis can still have an added value. Second, as argued above, it is very well possible that an approximated disqualification is introduced only with respect to a specific category within the approximated offence. The categorisation within the offence labels as done in EULOCS, creates the opportunity to be very specific about the scope of mandatory exclusion grounds and it is possible that they are limited to a selection of the subcategories within an offence. Here too, equivalent effect for the approximation acquis was a whole can provide an added value compared to the first technique in the disqualification triad.

the underlying behaviour falls within the largest common denominator of what is criminalized throughout the EU or a set of relevant jurisdictions. This conclusion raises questions not only with respect to the availability of information but also with respect to the position of the member states with respect to the consequence that the situation can occur in which a contracting authority cannot take account of a national conviction if it relates to behaviour that is not equally criminalized in the jurisdictions in which the other candidates operate.

3.4 Availability of information

If the use of prior convictions as exclusion grounds in the context of a public procurement procedure is limited to the largest common denominator amongst the criminalizations, this requires that the information on the prior convictions is sufficiently detailed to be able to decide whether or not the conviction falls with the scope of that largest common denominator.

This has a considerable impact on the required level of detail in the prior conviction information. If member states decide to allow exclusion in their jurisdiction for the predefined "common denominator" across the criminal codes of the entirety of the EU, that common denominator can be modelled to match the existing knowledge deduced from the approximation obligations. The difficulties related to the availability of information with respect to this policy option mirror the difficulties with respect to the availability of information elaborated on above in relation to the introduction of approximated exclusion grounds for approximated offences. The current level of detail in criminal records information cannot suffice; Striving for a comprehensive, consistent and well-balanced EU approach, it could be recommended to require member states to be able to distinguish between a conviction that relates to behaviour that has been subject to approximation and another conviction.

Alternatively, if the member states decide to further develop the EU largest common denominator beyond what jointly identified as (to be) criminalized in the national law of each of the member states and wish to exclude candidates for behaviour that is currently not included in the approximation acquis, similar flanking measures with respect to the availability of sufficiently detailed information are necessary. The same is true when member states decide to work with maximalist option and establish work with *ad hoc* largest common denominators based on the specific profiles of the tendering candidates.

3.5 Acceptability of exceptions to the equal treatment limitations

Following the conclusion that equal treatment requires a limitation in the convictions that are eligible for use as a ground for exclusion of the tendering candidate, the question arises to what extent exceptions to that policy recommendation are acceptable. Based solely in the equal treatment principle, it is possible that a candidate convicted nationally for a money laundering offence may not be excluded from participating in a public procurement procedure, for the behaviour underlying the money laundering conviction is not equally criminalized throughout the relevant jurisdictions.

At first sight it seems as though the decision on the fate of the national convictions is the sole competence of the individual member state, relying on the purely internal rule.[447] According to that purely internal rule, the EU principles related to free movement and equal treatment cannot be applied to situations that are confined to a single member state. However, such conclusion cannot be supported for two main reasons. First, the 'national' character of the conviction does not reveal any information on the nationality of the person involved and whether or not use was made of the free movement right. At least to the extent the national conviction is imposed to a foreign national, the purely internal rule cannot be applied. Second, with respect to the national candidates the purely internal rule cannot prevent the applicability of the equal treatment principle either. Acting as a participant in a public procurement procedure governed by EU law establishes the required link with EU law. Furthermore, the requirement to treat candidates equally is introduced in the Procurement Directive, indiscriminately and should therefore apply equally to foreign and national candidates, to foreign and national convictions.

The question arises whether a contracting authority can argue that disregarding a national conviction for money laundering simply because the underlying behaviour is not equally criminalized throughout the relevant jurisdictions in which the competitors operate, would not be acceptable.

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[447] See more in detail: TOBLER, C. (2005). Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC law. Antwerp-Oxford: Intersentia. RITTER, C. (2006). Purely internal situations, reverse discrimination, Guimont, Dzodzi and Article 234. *European Law Review*, 31(5), 690; Dautricourt, C., & Thomas, S. (2009). Reverse Discrimination and Free Movement of Persons under Community Law: All for Ulysses, Nothing for Penelope? *European Law Review*, 34(3), 433; Van Elsuwege, P. (2011). European union citizenship and the purely internal rule revisited. *European Constitutional Law review*, 7(2), 308.

It is important to understand that two interests collide. On the one hand, the interest of the tendering candidates consists of adhering to the principle of equal treatment. On the other hand, the interest of the contracting authority consists of allowing the exclusion of convicted candidates. Considering the importance of equal treatment of the tendering candidates for the proper functioning of public procurement in a European internal market, adhering to the equal treatment principle should be considered to be the baseline. However, to the extent that it can be motivated, an exception can be allowed to safeguard public order, national security or the integrity of the contracting authority. Therefore exceptions are only acceptable to the extent they can be motivated in light of a specific procurement procedure (no general motivation is allowed) and to the extent that an independent judicial review of the exclusion is available for the tendering candidates.

Two questions arise. First, what would be the impact of the acceptance to include national convictions in the scope of convictions that result to exclusion? Second, would it be acceptable to also want to be allowed to exclude a candidate for having been convicted for behaviour that does not constitute an offence under the national criminal law of the member state of the contracting authority?

First, if duly motivated, a contracting authority can be allowed to extend the scope of the exclusion grounds to include also its national money laundering convictions for reasons of public order, national security or the integrity of the contracting authority. In that situation the question arises how the scope of the exclusion ground with respect to money laundering is extended. It can be extended to encompass the largest common denominator complemented with the national money laundering convictions, or it can be extended to encompass the largest common denominator complemented with any conviction for which the underlying behaviour corresponds to the behaviour national criminalized as money laundering. The first would only sacrifice the equal treatment with respect to national money laundering convictions and in doing so maintain equal treatment between all other candidates. In doing so, a form of unequal treatment would be created between candidates with a national conviction and candidates with a foreign conviction for the exact same behaviour. The second would sacrifice the equal treatment with respect to all candidates that have a conviction – foreign or national – for the behaviour that is nationally criminalized, ensuring equal treatment between candidates with a conviction for the said behaviour, but creating a more extended form of unequal treatment in relation to candidates that fell within the jurisdiction of a member state that does not criminalize the said behaviour. Choosing the least bad option is not easy, because it is not clear which option is the least bad. Striving for a comprehensive, coherent and well-balanced system, it could be recommended to extend the exclusion ground in a way that best reflects equal treatment which is

the second option. In sum, if duly motivated a contracting authority can be allowed to extend the scope of the largest common denominator to encompass also other offences as criminalized in its national law, provided that the scope extension applies to all candidates' convictions. Differently put, when compared to the largest common denominator, so-called *further reaching national convictions* can be used as a basis for exclusion, provided that the scope extension applies to all the candidates' convictions, national or foreign.

Secondly, the question may arise whether a contracting authority can be allowed to exclude candidates from participation in a procurement procedure for having been convicted for committing behaviour that is criminalized abroad though not it its own member state. Differently put, the question would be whether, when compared to the largest common denominator, so-called *further reaching foreign convictions* can be used as a basis for exclusion. Not only will it be more difficult to motivate this extension of the exclusion ground for reasons of public order, national security or the integrity of the contracting authority, a such extension could amount to a form of indirect discrimination as a result of which the exception will be even more difficult to motivate.

The link with indirect discrimination is complex and requires further clarification. It is commonly accepted that in the EU all citizens are equal before law, and no discrimination based on a person's nationality is allowed. This principle is enshrined in Art. 18 TFEU (ex Art. 12 TEC) which stipulates that "discrimination on grounds of nationality is prohibited". This means it is not allowed to stipulate in national implementation provisions that with respect to national candidates, national criminal law shall apply to determine the scope of the exclusion grounds and with respect to foreign candidates, foreign criminal law shall apply to determine the scope of the exclusion grounds. A such formulation clearly distinguishes based on nationality and – considering the diversity between the criminalization in the criminal codes of the member states – declares different rules applicable depending on the person's nationality. This would mean that the scope of the exclusion grounds would not be the same for nationals and foreigners. To the extent that foreign criminal law criminalizes behaviour that is not criminalized in the criminal law of the contracting authority, this would mean that the foreign national is treated less favourably because the access requirements to enter the public procurement procedure would be stricter. This less favourable treatment of foreign candidates is not allowed.

However, at first sight, this is not what the member state or contracting authority intends to do. The member state or contracting authority wishes to foresee that all EU citizens will be excluded if their money laundering conviction relates to nationally behaviour criminalized or behaviour criminalised in any

other member state. This means that the same exclusion ground applies to all EU citizens, without a distinction based on their nationality. Differently put, this means that with respect to national *convictions* (not national *candidates*), national criminal law shall apply and with respect to foreign *convictions* (not foreign *candidates*), foreign criminal law shall apply regardless of the nationality of the persons involved. However, this provision is an example of a so-called seemingly neutral provision that *in its effect* entails a discrimination based on nationality which is – in analogy to the courts' settled case law – not allowed.

Though the suggestion is not directly discriminating, it is so in effect, and is therefore indirectly discriminating. This problem has been recognised by the Court of Justice in several cases.[448] A frequently used example is the *Schönheit case*, relating to the differential treatment of part-time and full-time employees. The rules governing the pension of part-time workers were different than the rules governing the pension of full-time workers. The disadvantageous pension regime of part-time workers was applicable to all workers, regardless of nationality, age, sex or any other protected criterion. However, because in practice, around 88% of the part-time workers are female, the rule will be discriminatory in its effect, because it will lead to a disadvantageous treatment of female employees.[449] This latter example of indirect discrimination on grounds of sex will be used as a basis for the argumentation to reject the reformulation of the provision on exclusion grounds.

In his opinion with respect to the *Nolte case*, Advocate General Léger summarised the position of the court when he stated that *"in order to be presumed discriminatory, the measure must affect 'a much greater number of women than men'*[450]*, 'a considerable lower percentage of men than women'*[451] *or 'far more women than men'*[452]*. Cases suggest that the proportion of women affected by the measure must be particularly marked.*[453] The court has never specified as of which percentage a measure is considered to be discriminatory, but has clearly held that the effect does not

[448] ECJ, Case C-171/88 Rinner-Kühn v. Spezial-Gebäudereinigung, 13 July 1989 at §14; ECJ, Case C-184/89 Nimz v. Freie und Hansestadt Hamburg, 7 February 1991, at §15; ECJ, Case C-33/89 Kowalska v. Freie und Hansestadt Hamburg, 27 June 1990, at §13.

[449] ECJ, Joint cases C-4/02 and C-5/02 Hilde Schönheit v Stadt Frankfurt am Main and Silvia Becker v. Land Hessen, 23 October 2003.

[450] For this formulation, he refers to ECJ, C-171/88 Rinner-Künh v. FFW Spezial-Gebäudereinigung, 13 July 1989, at §14.

[451] For this formulation, he refers to ECJ, Case C-184/89 Nimz v. Freie und Hansestadt Hamburg, 7 February 1991, at §15 and ECJ, Case C-33/89 Kowalska v. Freie und Hansestadt Hamburg, 27 June 1990, at §13.

[452] For this formulation, he refers to ECJ, Case C-343/92 De Weerd, née Roks and Others v. Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Laatschappelijke Belangen and Others, 24 February 1994, at §31

[453] Opinion of the Advocate General Léger, 31 May 1995, at §57-58, in relation to ECJ, Case C-317/93 Nolte v. Landesversicherunsanstalt Hannover, 14 December 1995.

have to be exclusively related to a protected category of persons to be discriminatory. The fact that there were also male part-time workers did not prevent the measure from being discriminatory on grounds of sex.

Applied to the wish of the member state or contracting authority, the appreciation of its discriminatory nature is dependent on the effect of the application thereof. Upholding that with respect to national *convictions* (not national candidates), national criminal law shall apply and with respect to foreign *convictions* (not foreign candidates), foreign criminal law shall apply, will only be discriminating based on nationality if national convictions are predominantly handed down against nationals and foreign convictions are predominantly handed down against foreigners. If, in spite of the increased mobility in the European Union, convictions are still predominantly handed down against the nationals of each of the respective member states, then, the policy option should – in its effect – be read as "With respect to national *convictions* (meaning mostly national *candidates*), national criminal law shall apply and with respect to foreign *convictions* (meaning mostly foreign *candidates*), foreign criminal law shall apply". A such provision would not be allowed in light of the prohibition to discriminate on grounds of nationality, to the extent that this would lead to a less favourable treatment of non-nationals and thus would lead to excluding candidates with further-reaching foreign convictions and no objective and reasonable justification (e.g. referring to a public order issue) is available.

Therefore, a correct appreciation of the policy option requires looking into the national conviction statistics to be able to determine whether convictions are or are not predominantly handed down against a Member State's own nationals. Because data gathered under the auspice of UNODC reveals that indeed, convictions are predominantly handed down against a Member States own nationals[454], the suggestion is not neutral in its effect and entails a prohibited form of discrimination in as far as the protected group would be disadvantaged and no objective and reasonable justification is available. This means that it would amount to discrimination if the protected group, *in casu* the foreign nationals, are excluded more easily and have to fulfil more requirements then nationals.

Due to this additional discrimination complication, an exception to the equal treatment requirement to limit the scope to the offences for which the underlying behaviour represents the largest common denominator in the national criminal law provisions applicable to the convictions of the competing candidates, will be difficult to sufficiently motivate.

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[454] Source: United Nations Survey of Crime Trends and Operations of Criminal Justice Systems (UN-CTS), which includes data covering the period 2003 to 2008.

It can therefore be concluded that the introduction of the obligation to attach equivalent effect to foreign convictions in the course of a public procurement procedure is not unlimited. Whereas taking account of foreign convictions in criminal procedures *may* be limited along a *double* criminality requirement – as desired by the individual member state – the taking account of foreign convictions in the course of a procurement procedure *should* be limited along an *overarching*[455] criminality requirement in absence of objective and reasonable justifications for exceptions. Convictions – foreign or national – can only be taken into account to the extent the underlying behaviour is included in the EU or ad hoc largest common denominator, to the extent that no public order exception can be substantiated. The adequate motivation of an exception with respect to convictions related to behaviour that is nationally criminalised and penalised with an exclusion from participation in a public procurement procedure will be more plausible than the motivation seeking to be allowed to exclude a candidate for having been convicted for behaviour that is not even criminalised in a national context.

3.6 Interpreting the national approaches

It was argued that roughly two approaches can be distinguished when analysing the national legislation with respect to the exclusion grounds.

A first type of member states has clearly identified for which behaviour conviction will lead to exclusion from participation in a public procurement procedure. It was clarified that Germany introduced references to its own national criminal code to delineate the scope of the exclusion grounds. An interpretation thereof in line with the equivalent effect principle as elaborated on means that German contracting authorities can only take account of convictions, national or foreign, for which the underlying behaviour matches with the German criminal code. A German contracting authority cannot exclude a candidate for having been convicted for e.g. a type of participation in a criminal organisation that is not criminalised under German criminal law. Having selected the prior convictions reflecting on the delineation included in the national criminal code, it is still important to adhere to the equal treatment principle, which means that the selected convictions can only have an excluding effect to the extent they fit into the largest common denominator. Exception thereto is only allowed to the extent a public order issue can be motivated. Taking account of the delineation of the exclusion grounds, such a public order

[455] *'double'* criminality is deliberately changed into *'overarching'* criminality because working with the largest common denominator requires that not only *'double'* criminality is tested between the conviction of the candidate and the national criminal law of the contracting authority, but criminality is *'overarching'* all jurisdictions represented by the candidates.

exception cannot result in the exclusion of a candidate based on a conviction for which the underlying behaviour is not criminalised under German law.

A second type of member states has not explicitly identified for which behaviour a conviction will lead to exclusion. This means that there is no limitation to the exclusion grounds based on the national criminal law. Those member states have left the door open for a public order motivation that seeks to be allowed to exclude a candidate for having been convicted for behaviour that is not criminalised in a national context.

4 Mutual recognition of exclusion from participating in a procurement procedure

The third policy recommendation within the disqualification triad consists of supporting mutual recognition for disqualifications as a sanctioning measure.

Mutual recognition in criminal matters hardly needs any introduction.[456] It is well known that in the context of cooperation in the European Union, the principle of mutual recognition in criminal matters was first brought up by Jack Straw at the Cardiff European Council in 1998.[457] At the time, the Council was asked to identify the scope for greater mutual recognition of decisions of each other's courts. The momentum grew in the course of the following year and was used to launch mutual recognition as the cornerstone of judicial cooperation at the Tampere European Council in 1999.

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[456] See also three recent PhD studies: Suominen, A. E. (2011). The principle of mutual recognition in cooperation in criminal matters. A study of the principle in four framework decisions and in the implementation legislation in the Nordic Member States: Intersentia; Ouwerkerk, J. (2011). Quid Pro Quo? A comparative law perspective on the mutual recognition of judicial decisions in criminal matters. Cambridge-Antwerp-Portland: Intersentia; Janssens, C. (2011). The principle of mutual recognition in the EU internal market and the EU criminal justice area : a study into the viability of a cross-policy approach. Antwerpen: Universiteit Antwerpen.

[457] Programme of Measures of 30 November 2000 to implement the principle of mutual recognition of decisions in criminal matters. OJ C 12 of 15.1.2001; See also more elaborately in S. PEERS (2004). Mutual recognition and criminal law in the European Union: Has the Council got it wrong? *Common Market Law Review*, 41, p 5-36; V. MITSILEGAS (2006) "The constitutional implications of mutual recognition in criminal matters in the EU. *Common Market Law Review*, 43, p 1277-1311, I. BANTEKAS (2007). The Principle of Mutual Recognition in EU Criminal Law. *European Law Review,* 32 (3), p 365-385, W. De BONDT and G. VERMEULEN, (2011). First things first: Characterising mutual recognition in criminal matters. In M. COOLS (Ed.), EU Criminal Justice, Financial & Economic Crime: New Perspectives (Vol. 5, pp. 17-38). Antwerpen-Apeldoorn-Portland: Maklu.

Even though it has been cited at countless occasions, the importance of paragraph 33 of the Tampere Presidency conclusions, justify it being cited once more:

> *Enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate co-operation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgements and to other decisions of judicial authorities*[458]

To implement the principle of mutual recognition in practice, mutual recognition instruments have been adopted with respect to a series of sanction measures. Though no instrument exists yet that specifically and exclusively deals with the mutual recognition of disqualifications as sanctioning measures, the main features in the other mutual recognition instruments can be used as a baseline to determine what mutual recognition of a disqualification *in casu* the exclusion to participate in a procurement procedure would look like. To draw the parallel with the principles in the existing mutual recognition instruments, the framework decision on the application of the principle of mutual recognition to [...] alternative sanctions will be used as a basis.[459]

In the following paragraphs it will become clear that the technique of mutual recognition in the specific case of being excluded from participating in a public procurement procedure will have only very limited added value when compared to the technique of ensuring equivalent effect as elaborated on above. The reason can be found in the specific characteristics of mutual recognition, but also in the fact that only few member states have introduced the *'sanction'* of being excluded from participation in a public procurement procedure in their criminal law system. Most member states have opted for a system that limits the access to participation in a public procurement procedure via the provisions governing the procurement procedure itself.

When interpreting the replies to question 1.2 specifically in relation to the exclusion from participation in a procurement procedure, only a minority of

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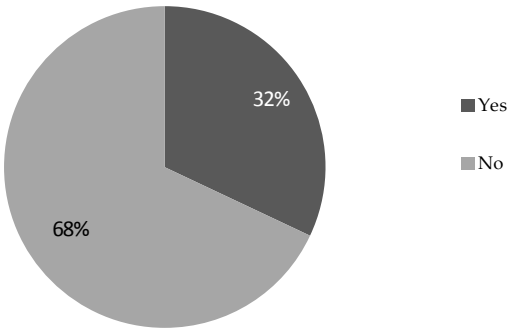
[458] Conclusions of the Presidency. SN 200/1/99 REV 1 15-16 October 1999.

[459] Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, OJ L 337 of 16.12.2008 [hereafter: FD Alternatives].

member states have indicated that the exclusion from participation in a procurement procedure is imposed or added in the course of a criminal procedure. In 68% of the member states the disqualifying effect of a conviction only rises when attempting to participate in a procurement procedure.

1.2 Is the disqualification from participating in a public procurement procedure imposed or added in the context of a criminal procedure?



This finding has a significant impact on the possibility to use mutual recognition in relation to being excluded from participating in a public procurement procedure. More importantly, the specific characteristics of mutual recognition play a crucial role in limiting the added value mutual recognition can have in relation to attaching equivalent effect. To clarify that position, the following paragraphs will elaborate on those specific characteristics. To that end, a distinction will be made between

- the situation in which a mutual recognition request is received in relation to an offence that would *nationally also* give rise to an exclusion from participation in a public procurement procedure; and
- the situation in which a mutual recognition request is received in relation to an offence that would *nationally not* give rise to an exclusion from participation in a public procurement procedure.

4.1 National exclusion foreseen

The first situation that will be discussed relates to a mutual recognition request received for an offence that would nationally also give rise to an exclusion from participation in a public procurement procedure. Whenever a member state receives a mutual recognition request that perfectly mirrors the national situation in that the sanction imposed corresponds to the sanction that would be imposed in a national situation, execution of the mutual recognition request will not be a problem. If, for example, a member state has foreseen in its national legislation that a conviction for a (particular form of) money laundering results in being excluded from participation in a public procurement procedure, the execution of a request to do just that will not create any problems. However, the question arises whether the mutual recognition request was at all necessary to achieve that result. After all, if the foreign money laundering conviction is taken into account via the technique of attaching effects to a foreign conviction that are equivalent to the effect a national conviction would bring about, the person involved would have been excluded from participation in a public procurement procedure based on the national legislation of the member state in which the public procurement procedure takes place, even in absence of a mutual recognition request. From that perspective, the mutual recognition request only doubles the basis upon which exclusion will take place, and can bring no added value in relation to the technique of attaching equivalent effect to foreign convictions.

However, the overlap between equivalent effect and mutual recognition is not complete. There is one situation in which the mutual recognition request can have an added value when compared to the technique of attaching equivalent effects to foreign conviction. There is one situation in which the exclusion based on mutual recognition extends beyond the exclusion based on equivalent effect. The situation may occur in which the *duration* of the foreign imposed execution from participation in a public procurement procedure exceeds the duration that is foreseen in the national legislation of the executing member state. It is important though that this situation is further elaborated on, for not every exceeding duration will automatically create an added value for mutual recognition.

In the current mutual recognition instruments, provisions are included on how to deal with situations in which the duration imposed in the issuing member state exceeds the duration known in the executing member state. Art. 9 FD Alternatives clarifies that *if the nature or duration of the relevant probation measure or alternative sanction, or the duration of the probation period, are incompatible with the law of the executing State, the competent authority of that State may adapt*

them in line with the nature or duration of the probation measures and alternative sanctions, or duration of the probation period, which apply, under the law of the executing State, to equivalent offences. This means that the member states have the discretion to decide on the faith of the execution of *in casu* being excluded from participation in a public procurement procedure for a duration that exceeds the duration foreseen in the national legislation of the executing member state. Where the member states have decided that the duration will be limited to the duration foresee in the national legislation, again mutual recognition of the foreign conviction will have no added value whatsoever to attaching equivalent effects to the foreign conviction, for the net effect will be the same: an exclusion corresponding to the national legislation of the executing member state. Where member states have decided to execute a foreign decision even where the duration exceeds the maximum duration foreseen in their national legislation, mutual recognition may have an added value when compared to attaching equivalent effects to foreign convictions, provided that one more condition is satisfied.[460]

Even where the duration of the foreign exclusion exceeds the duration foreseen in the national legislation of the executing member state, and that member state has provided in its national legislation to be willing to execute foreign convictions regardless of exceeding durations, still it is not guaranteed that mutual recognition will be able to have an added value compared to attaching equivalent effects to that foreign conviction. After all, as soon as the decision is taken to execute the foreign conviction and exclude the person involved from participating in a public procurement procedure, it must be assessed whether or not proceeding with the execution would not jeopardize the equal treatment principle that is fundamental to the proper functioning of the public procurement procedure. This means that a contracting authority can only take account of the exceeding duration to the extent that such would not result in an unequal treatment of the candidate involved. To that end, it must be assessed whether or not the duration does not exceed the largest common denominator of exclusion durations as provided for in the relevant jurisdictions of the competitors in the public procurement procedure. Only when the duration – though exceeding the duration foreseen nationally in the legislation of the member state in which the public procurement procedure takes place – does not

[460] Elsewhere, it has consistently been argued that adaptation should not be a *possibility* but an *automatic* consequence when there is a differences in duration between the sanction imposed in the sentencing member state and the maximum foreseen in the executing member state. It has been argued to introduce a mandatory *lex mitior* principle. See: G. VERMEULEN, A. VAN KALMTHOUT, N. PATERSON, M. KNAPEN, P. VERBEKE & W. DE BONDT (2011). Cross-border execution of judgements involving deprivation of liberty in the EU. Overcoming legal and practical problems through flanking measures (Vol. 40, IRCP-series). Antwerp-Apeldoorn-Portland: Maklu.

exceed the duration foreseen in the jurisdictions of the other (relevant) member states, can mutual recognition actually take place. Only in this very specific situation, mutual recognition will have an added value compared to the technique of attaching equivalent effects to foreign convictions.

4.2 National exclusion not foreseen

The second situation that will be discussed relates to a mutual recognition request received in relation to an offence that would nationally not give rise to an exclusion from participation in a public procurement procedure. There are two reasons why the offence would not give rise to an exclusion in a national situation: either the offence is not punishable according to the national law of the executing member state and therefore is not sanctioned with an exclusion from participation in a public procurement procedure; or the offence – though criminalized under the national law of the executing member state – is not punished with an exclusion but with a different sanction under national law. These two possibilities will be dealt with consecutively.

First, the situation may occur in which a mutual recognition request relates to a conviction for which the underlying behaviour is not criminalized under the national law of the executing member state. A such situation will give rise to a double criminality concern. Whether or not the mutual recognition request will be executed is dependent on the specificities of the underlying behaviour, and more specifically dependent on either or not abandoning the double criminality requirement for that offence type.

Firstly, the abandonment of the double criminality requirement for a set of 32 listed offences is one of the most controversial features of the mutual recognition instruments.[461] Member states have agreed to draw up a list of offences for which the differences in criminalization are deemed considerable enough to hinder cooperation and execution of foreign judgments. The fact that national exclusion is not foreseen because the underlying behaviour is not criminalized in the national legislation is completely irrelevant in case the behaviour underlying the conviction is included amongst those 32 offence labels. This means that mutual recognition might have an added value when compared to attaching equivalent effects to foreign convictions to the extent that a double criminality problem

[461] De Bondt, W., & Vermeulen, G. (2011). First things first: Characterising mutual recognition in criminal matters. In M. Cools (Ed.), EU Criminal Justice, Financial & Economic Crime: New Perspectives (Vol. 5, pp. 17-38). Antwerpen-Apeldoorn-Portland: Maklu; van Sliedregt, E. (2009). The Double Criminality Requirement. In N. Keijzer, & E. van Sliedregt (Eds.), The European Arrest Warrant in Practice (pp. 51-70). The Hague: T.M.C. Asser Press; Mitsilegas, V. (2006). The constitutional implications of mutual recognition in criminal matters in the EU. Common Market Law Review, 43, 1277.

occurs in relation to a listed offence, and *again* provided that the execution of the mutual recognition request will not result in an unequal treatment of the candidate involved when compared to the other competitors in the procurement procedure. Equal treatment will prevent execution of the foreign conviction in the event the underlying behaviour is not equally criminalized in the (relevant) jurisdictions of the competitors.

Secondly, for the offences not included in the 32 offence list, it is left to the member states to decide whether or not it is deemed appropriate to limit execution of foreign convictions to situations where double criminality is met. In the event member states have limit execution to situations where double criminality is met, mutual recognition will not have any value when compared to the technique of attaching equivalent effects to foreign decisions. In the event member states have agreed to execute foreign decisions, even beyond the double criminality requirement, the added value of mutual recognition will be limited to those situations in which execution will not jeopardize equal treatment between candidates. Here too, the added value of mutual recognition is limited to a very specific situation.

Second, the situation in which the exclusion is not foreseen in the national law of the executing member state can also be caused by the simple fact that exclusion from participation in a public procurement procedure is not foreseen as a sanction for the specific offence involved. Similar to what was argued above, this situation requires that the national adaptation provisions are looked into. Art. 9 FD Alternatives allows member states to adapt the foreign sanction if either the nature or duration of the sanction is incompatible with their national law. Though no common understanding (yet) exists on the interpretation of the incompatibility concern[462] it can be argued that the imposed exclusion from participation in a public procurement procedure is incompatible with the law of the executing member state, for such sanction is not foreseen in relation to the offence involved. If member states have legislated that the sanction will be adapted and the exclusion disregarded, the introduction of mutual recognition will have no added value when compared to the technique of attaching equivalent effect to foreign convictions. Only where member states accept to execute a sanction in spite of it not being foreseen for the offence involved in the national legislation and under the condition that execution thereof would not give rise to an unequal treatment of the person involved when compared to the other competitors, mutual recognition can have an added value.

[462] i.e. whether or not incompatibility in terms of the nature of the sanction can only be invoked in relation to sanctions that are unknown altogether in the national law of the executing member state, or whether incompatibility in terms of the nature of the sanction also occurs when a particular sanction is not foreseen in relation to the offence involved.

Considering the limited added value of mutual recognition when compared to attaching equivalent effect to foreign convictions as complemented by the introduction of approximated disqualifications for approximated offences, the priorities in terms of future policy making should be focussed on those two latter techniques.

5 Summary of recommendations in the area of public procurement

This case study looked into the functioning of disqualifications in a public procurement context and more specifically into the scope *ratione materiae* of the exclusion from participation in a procurement procedure, against the background of the disqualification triad.

First, approximated disqualifications for approximated offences can already be found in the context of public procurement. Art. 45 Procurement Directive elaborates on the mandatory conviction-related exclusion grounds. Three main recommendations are made. Firstly, considering the rapidly developing approximation acquis, it is advised to look for an approach that delineates the scope of the mandatory exclusion grounds in a way that is transparent and can stand the test of time. The current approach cannot suffice. It is suggested to use the EU level offence classification system as a basis to identify the (categories of) offences for which conviction should result in a mandatory exclusion. Secondly, to increase cross-instrument consistency, it is advised to include the existence of mandatory exclusion grounds in instruments that approximate the constituent elements of offences and their sanctions. Thirdly, the current level of detail in the criminal records information cannot support a distinction between a conviction that relates to identified approximated behaviour that should lead to exclusion and a conviction that relates to other behaviour. An increase in the level of detail in the available criminal records information is necessary to ensure the proper functioning of the mandatory exclusion grounds.

Second, attaching to foreign convictions effects that are equivalent to the effects national convictions would have, should be further developed. The scope for taking account of foreign convictions can either or not be modelled on the national criminal code, but foremost it is important that due account is taken of the implications of the need to ensure equal treatment between all competing candidates. To that end, convictions can only be taken into account to the extent they relate to the largest common denominator identified, either EU-wide or *ad hoc* based on the specific profiles of the competing candidates. The only exception thereto consists of the public order exception, which can be motivated

with respect to a conviction for which the underlying behaviour is criminalised in the national criminal law of the contracting authority. The indirect discrimination complexity makes motivation far more difficult in relation to a conviction for which the underlying behaviour is not criminalised under the national criminal law of the contracting authority. Here too, sufficiently detailed criminal records information is crucial to adhere to the equal treatment principle and remains the main concern for the practical implementation thereof.

Third, though mutual recognition is an important element in the disqualification triad that seeks to extend the effect of disqualifications as sanction measures in the EU, the added value thereof specifically in a public procurement context when compared to the effect of attaching equivalent effects to foreign convictions is fairly limited. This can be explained referring to the limited number of member states that actually impose exclusion from participation in a public procurement procedure as a sanction and can have an interest in seeking cross-border execution thereof. More importantly, the cooperation principles governing the current set of mutual recognition instruments have an important limiting impact. Mutual recognition can only have an added value in two very specific situations.

Firstly, mutual recognition can have an excluding effect beyond the technique of attaching equivalent effect in the situation:

- where the duration of the exclusion imposed in the sentencing state exceeds the maximum duration foreseen in the executing member state; ánd
- the executing member state has not introduced a mandatory adaptation of the duration in case of inconsistency with the national law; ánd
- execution will not jeopardise the equal treatment of the person involved with the competing candidates for the duration still falls within the largest common denominator identified amongst the relevant EU jurisdictions, provided that no public order exception can be motivated.

Secondly, mutual recognition can have an excluding effect beyond the technique of attaching equivalent effect in the situation:

- where the underlying behaviour is not criminalised in the executing member state; ánd
- execution is not (made) dependent on a double criminality requirement; ánd
- execution will not jeopardise the equal treatment of the person involved with the competing candidates for the criminalisation still falls within the largest common denominator identified amongst the relevant EU jurisdictions, provided that no public order exception can be motivated.

Considering the limited added value of mutual recognition when compared to attaching equivalent effect to foreign convictions as complemented by the introduction of approximated disqualifications for approximated offences, the priorities in terms of future policy making should be focussed on those two latter techniques.

Part 3 – References

References

1 Legal instruments and policy documents

1.1 United Nations

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Part 4 – Dutch summary

Nederlandstalige samenvatting

Net zoals het eigenlijke doctoraat start deze samenvatting met een probleemstelling, de bijhorende onderzoeksvragen en de aanpak om die te beantwoorden gevolgd een korte toelichting bij de vorm van het doctoraat en de hoofdlijnen van de argumentatie over de nood en haalbaarheid van een EU misdrijfbeleid.

Probleemstelling, onderzoeksvragen en aanpak

Vertrekkend vanuit de vaststelling dat elke EU lidstaat een eigen strafrecht heeft als gevolg waarvan (1) het gedrag dat als misdrijf gekwalificeerd wordt in de ene lidstaat, niet noodzakelijk strafbaar gesteld is in een andere lidstaat, (2) zelfs wanneer de strafbaarstellingen overeenkomen er nog verschillen kunnen bestaan met betrekking tot de toepasselijke straf(maat) en (3) er ook meer algemeen grote verschillen zijn in de positie die misdrijven in het totale rechtssysteem innemen, rijzen de volgende onderzoeksvragen: "In welke mate ondervindt het EU beleid moeilijkheden door die misdrijfgerelateerde verschillen?" en "In welke mate het haalbaar is om die moeilijkheden het hoofd te bieden om een allesomvattende, consistente en gebalanceerde manier?".

Om op die vragen te antwoorden is het in de eerste plaats belangrijk om na te gaan in welke beleidsdomeinen misdrijven een rol spelen en dus welke beleidsdomeinen mogelijk hinder ondervinden van de misdrijfgerelateerde verschillen. Analyse heeft uitgewezen dat een brede waaier aan beleidsdomeinen in meer of mindere mate misdrijfafhankelijk is.

In eerste instantie kan daarbij gedacht worden aan de criminaliteitsstatistiek die erg belangrijk geacht wordt ter ondersteuning, verantwoording en evaluatie van strafrechtelijk beleid. Lidstaten kijken daarbij niet langer enkel naar hun eigen criminaliteitsstatistieken, maar zijn steeds meer geïnteresseerd om aan grensoverschrijdende vergelijking te doen. Bovendien heeft ook de EU in haar hoedanigheid van beleidsmaker een zekere interesse in criminaliteitsstatistieken ter ondersteuning, verantwoording en evaluatie van haar eigen strafrechtelijke beleid. De haalbaarheid van grensoverschrijdende vergelijking en samenvoeging van data wordt echter gehypothekeerd door de verschillen in de strafbaarstelling van het gedrag dat eraan ten grondslag ligt. In deze context werden de onderzoeksvragen geherformuleerd als: "In welke mate is er nood aan EU criminaliteitsstatistieken voor de ontwikkeling van EU beleid?" en "In welke mate zijn vergelijkbare criminaliteitsstatistieken haalbaar?" Om die vragen te beantwoorden werd allereerst de kennis over gelijklopende strafbaarstellingen in kaart gebracht; zulks geeft immers aan waar de grens van

vergelijkbare criminaliteitsstatistiek zich bevindt. Nadien werd in de context van een EU onderzoek naar criminaliteitsstatistieken nagegaan in welke mate de lidstaten in staat zijn om data aan te leveren enkel met betrekking tot de gelijklopende delen van de strafbaarstellingen. Ter afronding van dit deel werd op basis van een discours analyse bepaald welke de EU prioritaire misdrijven zijn en voor welke misdrijven criminaliteitsstatistiek onontbeerlijk is om een goed beleid te kunnen garanderen. De haalbaarheid van vergelijkbare criminaliteitsstatistieken werd geanalyseerd door de resultaten van de discours analyse in verband te brengen met de resultaten van de bevraging in de lidstaten.

In tweede instantie kan daarbij gedacht worden aan de dubbele strafbaarheidsvoorwaarde die te vinden is in heel wat internationale samenwerkingsinstrumenten. Lidstaten hebben bepaalde vormen van samenwerking afhankelijk gesteld van de voorwaarde dat het gedrag dat aan een dossier ten grondslag ligt ook strafbaar is in de aangezochte of uitvoerende lidstaat. In deze context werden de onderzoeksvragen geherformuleerd als: "In welke mate is internationale samenwerking afhankelijk van de dubbele strafbaarheidsvoorwaarde?" en "In welke mate is het haalbaar om onaanvaardbare en onnuttige dubbele strafbaarheidsverificaties uit te sluiten?". Deze vraag kwam aan bod in verschillende onderzoeken. Als eerste werd tijdens een EU onderzoek naar bewijsgaring en bewijstoelaatbaarheid nagegaan welke positie dubbele strafbaarheid daarin heeft. Bovendien werd ook de haalbaarheid getest om in het verlengde van het huidige acquis, de dubbele strafbaarheidsverificatie niet langer toe te laten wanneer een EU instrument een overeenkomstige criminaliseringsverplichting inhoudt. Nadien kwam de positie van dubbele strafbaarheid meer in algemene zin aan bod in het EU onderzoek naar de toekomst van internationale samenwerking in strafzaken. Ook daarin werd de positie van dubbele strafbaarheid nagegaan alsook de haalbaarheid van toekomstige mogelijke beleidslijnen getoetst.

In derde instantie kan daarbij gedacht worden aan de grensoverschrijdende verzameling en toelaatbaarheid van bewijsmateriaal. Samenwerking kan ook hinder ondervinden zelfs wanneer het gedrag dat aan een dossier ten grondslag ligt strafbaar gesteld is in beide lidstaten. Zo kunnen bijvoorbeeld de verschillen in de beperking van de inzetbaarheid van sommige onderzoeksmaatregelen op basis van het betrokken misdrijf, vlotte samenwerking in de weg staan. In deze context werden de onderzoeksvragen geherformuleerd als: "In welke mate bemoeilijken de misdrijfgerelateerde verschillen grensoverschrijdende verzameling en toelaatbaarheid van bewijsmateriaal?" en "In welke mate is het haalbaar om de moeilijkheden op een allesomvattende, consistente en gebalanceerde manier het hoofd bieden?". Om die vragen te beantwoorden werd in het bovenvermelde EU onderzoek naar bewijsgaring en

bewijstoelaatbaarheid ook de aandacht gevestigd op de misdrijfgerelateerde beperkingen op het gebruik van onderzoeksmaatregelen alsook de beleidsbeslissing om de eraan gelinkte weigeringsgronden niet langer toe te staan voor die misdrijven opgenomen in de 32 lijst wanneer een huiszoeking of inbeslagname gevraagd wordt. In het verlengde daarvan werd de haalbaarheid getoetst om die inperking van de weigeringsgronden door te trekken naar andere onderzoeksmaatregelen.

In vierde instantie kan daarbij gedacht worden aan de mandaten van EU actoren als Eurojust en Europol. Het vage en ongedefinieerde karakter van de misdrijflabels die gebruikt worden ter afbakening van hun mandaat is al vaak het voorwerp van discussie geweest. Niet alleen wordt aangegeven dat het de uitoefening van het bestaande takenpakket bemoeilijkt, het bemoeilijkt ook het bereiken van een politiek akkoord met betrekking tot de uitbreiding van het takenpakket. In deze context werden de onderzoeksvragen geherformuleerd als: "In welke mate bemoeilijken misdrijfgerelateerde verschillen de afbakening van de mandaten en het daaraan gekoppelde takenpakket?" en "In welke mate is het haalbaar om de mandaten af te bakenen op een allesomvattende, consistente en gebalanceerde manier?". Om op die vraag te beantwoorden werd in het kader van het bovenvermelde EU onderzoek naar de toekomst van internationale samenwerking in strafzaken nagegaan in welke mate er een echte nood aan afbakening van de mandaten bestaat en in welke mate de kennis over gelijklopende strafbaarstellingen een rol kan spelen om moeilijkheden het hoofd te bieden.

In vijfde instantie kan daarbij gedacht worden aan de grensoverschrijdende uitvoering van straffen. Alvorens de uitvoering van een in een andere lidstaat opgelegde straf aan te vatten, is het lidstaten toegelaten om de equivalentie tussen de opgelegde straf en de voorziene nationale straf na te gaan. Desgewenst kan de uitvoerende lidstaat de duur en/of de aard van de straf aanpassen. Voor de correcte toepassing van deze aanpassingsmogelijkheid zoals voorzien in het EU instrumentarium is het belangrijk voldoende informatie te hebben over het gedrag dat aan de veroordeling ten grondslag ligt. In deze context werden de onderzoeksvragen geherformuleerd als: "In welke mate bemoeilijken de misdrijfgerelateerde verschillen het identificeren van de equivalente nationale straf?" en "In welke mate is het haalbaar om de identificatie van de equivalente straf te ondersteunen?". Om die vraag te beantwoorden werd er in het kader van het EU onderzoek over detentie gewezen op de moeilijkheden en op de haalbaarheid om die moeilijkheden het hoofd te bieden door gebruik te maken van de kennis over gelijklopende strafbaarstellingen. De redenering werd ook hernomen in het bovengenoemde EU onderzoek over de toekomst van de internationale samenwerking in strafzaken.

In zesde instantie ten slotte kan daarbij ook gedacht worden aan de regels die het effect van een eerdere veroordeling bepalen. Het hebben van een eerdere veroordeling is niet alleen relevant tijdens een strafprocedure, maar kan ook relevant zijn voor de toepassing van de bepalingen uit andere takken van het recht. De vereiste een uittreksel uit het strafregister voor te leggen zoals voorzien in het arbeidsrecht of het openbare aanbestedingsrecht kunnen daarbij als voorbeeld dienen. In die context werden de onderzoeksvragen geherformuleerd als: "In welke mate wordt het in acht nemen van eerdere veroordelingen bemoeilijkt door de misdrijfgerelateerde verschillen?" en "In welke mate is het haalbaar om het afbakenen van het in acht nemen van eerdere veroordelingen te ondersteunen?". Om op die vragen te antwoorden werden twee casestudies uitgewerkt. Als eerste werden de nationale bepalingen inzake de staat van herhaling in de strafprocedure van de 27 lidstaten geanalyseerd om uit te maken in welke mate de toepassing ervan beperkt is tot veroordelingen waarvan het gedrag dat eraan ten grondslag ligt eveneens strafbaar gesteld is in de vervolgende lidstaat. Vervolgens werd de haalbaarheid van een verfijning van het systeem dat de uitwisseling van strafregisterinformatie ondersteunt, geanalyseerd. Als tweede werden de nationale bepalingen inzake overheidsaanbestedingen van de 27 lidstaten geanalyseerd om ook daar uit te maken in welke mate de toepassing ervan beperkt is (zou moeten zijn) tot veroordelingen waarvan het gedrag dat eraan ten grondslag ligt eveneens strafbaar is in de aanbestedende lidstaat. Specifiek aan deze casus werd ook het gevolg van het principe van de gelijke behandeling van naderbij bekeken om uit te maken in welke mate dat de in achtneming van eerdere veroordelingen bemoeilijkt. In het kader van een openbare aanbestedingsprocedure is de nood om de moeilijkheden gekoppeld aan de misdrijfgerelateerde verschillen het hoofd te bieden daarom mogelijk veel groter dan in de andere casestudie. Ook hier werd de haalbaarheid van een verfijning van het systeem dat de uitwisseling van strafregisterinformatie ondersteunt, geanalyseerd in het kader van een recent EU onderzoek naar misdrijfgerelateerde disqualificaties.

Doctoraat op basis van publicaties

Deze onderzoeksvragen werden beantwoord in een zogeheten "doctoraat op basis van publicaties". Dit doctoraat omvat twee tijdschrift artikels en drie hoofdstukken in boeken:

- De Bondt, W. (onder review). Evidence based EU criminal policy making: in search of valid data. European Journal on Criminal Policy and Research.
- De Bondt, W. (2012). Double criminality in international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.),

Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality (pp. 86-159). Antwerp-Apeldoorn-Portland: Maklu.

- De Bondt, W., & Vermeulen, G. (2012). EULOCS in support of international cooperation in criminal matters. In G. Vermeulen, W. De Bondt, & C. Ryckman (Eds.), Rethinking international cooperation in criminal matters. Moving beyond actors, bringing logic back, footed in reality. Antwerp-Apeldoorn-Portland: Maklu.
- De Bondt, W. (onder review). Cross-border recidivism in the EU: Fact or Fiction? Evaluating the supporting policy triangle. Punishment and Society.
- De Bondt, W. (2012). Rethinking public procurement exclusions in the EU. In G. Vermeulen, W. De Bondt, C. Ryckman, & N. Persak (Eds.), The disqualification triad. Approximating legislation. Executing requests. Ensuring equivalence. Antwerp-Apeldoorn-Portland: Maklu.

Nood aan en haalbaarheid van een EU misdrijfbeleid

Het doctoraatsonderzoek bracht aan het licht (1) dat misdrijfgerelateerde verschillen de toepassing van sommige principes en bepalingen bemoeilijkt, daar waar het geen beletsel vormt voor de toepassing van andere principes en bepalingen, (2) dat de huidige aanpak allerminst allesomvattend, consistent en gebalanceerd is en (3) dat het mogelijk is om de moeilijkheden het hoofd te bieden op voorwaarde dat de kennis over de gelijklopende strafbaarstellingen gebruikt wordt als basis voor de ontwikkeling van een EU misdrijfbeleid. Het heeft aangetoond dat een dergelijk EU misdrijfbeleid nodig en bovendien haalbaar is en toelaat om op een allesomvattende, consistente en gebalanceerde manier het hoofd te bieden aan de moeilijkheden die geïdentificeerd werden.

Op hoofdlijnen kan de argumentatie als volgt worden weergegeven:

- **Gestructureerd weergeven van het gehele acquis van gelijklopende strafbaarstellingen in een EU misdrijfclassificatiesysteem (EULOCS).** Het feit dat strafrecht in essentie nationaal is en er grote verschillen zijn, betekent niet dat er geen gelijklopende strafbaarstellingen geïdentificeerd kunnen worden. Het doctoraatsonderzoek heeft in dat verband benadrukt dat er meer is aan gelijklopende strafbaarstellingen dat datgene wat we kennen door de klassieke harmonisatie-instrumenten. Ook naast de kaderbesluiten en de nieuwe richtlijnen, zijn er nog tal van andere instrumenten die in het verleden gebruikt zijn om gelijklopende strafbaarstellingen te bekomen. Daarbij moet niet alleen naar de EU gekeken worden, maar zijn ook instrumenten van de Raad van Europe en de Verenigde Naties belangrijk.

Omdat het acquis van gelijklopende strafbaarstellingen een cruciale rol heeft in de uitwerking van een EU misdrijfbeleid is het aangewezen dat acquis weer te geven in een toegankelijk EU misdrijfclassificatiesysteem (EULOCS). Tot slot mag niet uit het oog verloren worden dat deze harmonisatie-instrumenten tot doel hebben om waar nodig te vermijden dat bepaalde fenomenen door de mazen van het net glippen, wat betekent dat ze zich geenszins inlaten met de strafbaarstellingen waarvoor het gelijklopende karakter reeds gegarandeerd is door de historische ontwikkeling ervan. Het kan overwogen worden om in EULOCS ook aan te geven voor welke niet-geharmoniseerde misdrijven de gelijklopende strafbaarstelling toch een feit is.

- **Verzekeren van vergelijkbare criminaliteitsstatistieken.** Het doctoraats-onderzoek heeft gewezen op de moeilijkheden die misdrijfgerelateerde verschillen met zich brengen wanneer gepoogd wordt om criminaliteitsstatistieken van verschillende lidstaten met elkaar te vergelijken. Daarnaast heeft het doctoraatsonderzoek ook gewezen op de nood om de beschikbaarheid van EU brede vergelijkbare criminaliteits-statistieken te verzekeren voor een aantal prioritaire criminaliteitsfenomenen. Het is de verantwoordelijkheid van de EU om de uitwerking van een strafrechtelijke beleid voor die prioritaire criminaliteitsfenomenen aan te vullen met een beleid dat de beschikbaarheid van de nodige vergelijkbare criminaliteitsstatistieken garandeert. Interventie op korte termijn is aangewezen. Daarbij kan het acquis aan gelijklopende strafbaarstellingen zoals weergegeven in EULOCS een leidraad vormen.
- **Vermijden van onaanvaardbare of onnuttige dubbele strafbaarheids-toetsen.** Het doctoraatsonderzoek heeft gewezen op de vrijheid van de lidstaten om bepaalde vormen van samenwerking afhankelijk te maken van de voorwaarde dat het gedrag dat aan een dossier ten grondslag ligt ook strafbaar gesteld is in de aangezochte of uitvoerende lidstaat. Om de consistentie in het EU beleid te garanderen, is het evenwel vereist dat die vrijheid de engagementen in het kader van het harmonisatiebeleid niet ondermijnen. Het is onaanvaardbaar om een dubbele strafbaarheids-probleem op te werpen in relatie tot een misdrijf waarvan de strafbaarheid het voorwerp uitmaakt van een harmonisatieverplichting. Een herformulering van de dubbele strafbaarheidsbepalingen dringt zich op. Bovendien is het onnuttig om een dubbele strafbaarheidstoets uit te voeren met betrekking tot misdrijven waarvan de dubbele strafbaarheid gekend is. Vandaar dat gewezen werd op de meerwaarde die het acquis aan gelijklopende strafbaarstellingen zoals weergegeven in EULOCS kan hebben om het toetsen van dubbele strafbaarheid te beperken tot die dossiers

waarvan de dubbele strafbaarheid van het gedrag dat eraan ten grondslag ligt, niet gekend is.

- **Ondersteunen van grensoverschrijdende bewijsgaring en bewijstoelaatbaarheid.** Het doctoraat heeft gewezen op de moeilijkheden die het gevolg zijn van de misdrijfgerelateerde verschillen in de strafwetboeken van de verschillende lidstaten en op de beleidskeuze die gemaakt werd in het kader van het Europees bewijsverkrijgingsbevel om die verschillen niet langer het voorwerp te laten uitmaken van mogelijke weigeringsgronden. In het licht daarvan werd geargumenteerd dat een allesomvattend, consistent en gebalanceerd beleid dat de nood aangeeft om bepaalde misdrijven op een gemeenschappelijke manier aan te pakken, zich niet beperkt tot het harmoniseren van het betrokken misdrijf maar er ook naar streeft om de gerelateerde bewijsproblematiek op een manier te reguleren die grensoverschrijdende bewijsgaring en bewijstoelaatbaarheid garandeert. In het licht van de beleidskeuzes gemaakt in het kader van het Europees bewijsverkrijgingsbevel werd gewezen op de meerwaarde die het acquis aan gelijklopende strafbaarstellingen zoals weergegeven in EULOCS kan hebben.
- **Verduidelijking van de mandaatsgebieden van de EU actoren.** Het doctoraat heeft erop gewezen dat er geen algehele nood is om de mandaatsgebieden van de EU actoren strikt af te bakenen op basis van het acquis aan gelijklopende strafbaarstellingen. Het verdient de voorkeur om voor een aantal van de taken het ruime karakter te bewaren om lidstaten de mogelijkheid te laten een beroep te doen op de EU actoren voor bepaalde misdrijfcategorieën, ongeacht de EU brede strafbaarstelling van het specifieke onderliggende gedrag. Daarnaast is het voor andere bestaande taken en mogelijke toekomstige taken wel belangrijk om een duidelijke afbakening te voorzien. De problematische informatie-uitwisseling zoals die vandaag bestaat werd daarbij als voorbeeld uitgewerkt, evenals de moeilijkheden in het debat om de actoren nieuwe verderstrekkende zogenoemde sterke bevoegdheden toe te kennen. Ook hier werd gewezen op de logica om het acquis aan gelijklopende strafbaarstellingen zoals weergegeven in EULOCS te gebruiken als basis voor de verduidelijking van de mandaatsgebieden.
- **Ondersteunen van equivalentietoetsen van buitenlandse straffen.** Het doctoraatsonderzoek heeft gewezen op de moeilijkheden die misdrijfgerelateerde verschillen meebrengen alvorens de uitvoering van een in het buitenland opgelegde straf aangevat kan worden. Aangezien lidstaten de mogelijkheid hebben om de equivalentie tussen de in het buitenland opgelegde straf en de hypothetisch in het eigen land opgelegde straf te vergelijken, is het belangrijk om voldoende informatie mee te geven over het gedrag dat aan de veroordelingen ten grondslag ligt. Net daar schiet het EU

beleid te kort. Het detail dat nu over het gedrag meegegeven wordt is onvoldoende gedetailleerd om een dergelijke equivalentietest uit te voeren. Ook hier werd gewezen op de logica om het acquis aan gelijklopende strafbaarstellingen zoals weergegeven in EULOCS te gebruiken als basis voor het opnemen van meer detail om zo de nodige equivalentietoetsen te ondersteunen.

– **Afbakenen van het effect van eerdere veroordelingen.** Het doctoraatsonderzoek heeft gewezen op de grote diversiteit aan bepalingen waarvan de toepassing afhankelijk is van het bestaan van en het type eerdere veroordeling, zowel binnen het strafrecht als binnen andere takken van het recht. Ook hier is voldoende informatie over het gedrag dat aan de veroordeling ten grondslag ligt, cruciaal voor de correcte toepassing ervan. Op basis van twee casestudies werd aangetoond dat de moeilijkheden en de oplossingen sectorspecifiek zijn en kunnen verschillen voor elk van de bepalingen die gebruik maken van het bestaan van en het type eerdere veroordeling. Ook hier werd gewezen op de logica en nood om het acquis aan gelijklopende strafbaarstellingen zoals weergegeven in EULOCS te gebruiken als basis voor het opnemen van meer detail om zo de correcte afbakening van het effect van eerdere veroordelingen mogelijk te maken.